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Supreme Court of the United States

October Term, 1975

No. 74-1318

DREW MUNICIPAL SEPARATE SCHOOL DISTRICT, et al.,

Petitioners,

—v.—

KATIE MAE ANDREWS, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS

CHARLES VICTOR MCTEER
JOHNNIE EARL WALLS, JR.
P.O. Box 634
819 Main Street
Greenville, Mississippi 38701

LEWIS MEYERS
North Mississippi Rural Legal Services
Oxford, Mississippi 38655

RHONDA COPELON
ELIZABETH M. SCHNEIDER
MORTON STAVIS
NANCY STEARNS
Center for Constitutional Rights
853 Broadway
New York, New York 10003
Counsel for Respondents

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BRIEF OF RESPONDENTS

Counter-Statement of the Questions Presented

1. Whether a rule barring employment of parents of out-of-wedlock children in a public school system is invalid under the Fourteenth Amendment as bearing no rational relationship to a legitimate governmental interest where no such barring exists for engaging in pre- or extra-marital intercourse, but only for the bearing and rearing of a child, where the rule takes no account of any of the circumstances of the conception and permits no curing of one's condemned status even by subsequent marriage of the child's parents, and where the rule applies

widely to school personnel, including such as have little or no relationship to students, and where there is no proof that the teacher's status was known by or had impact on students.

2. Whether a rule barring employment in a public school system is invalid under the Fourteenth Amendment as an interference with the parent-child relationship and the right of nurturance where the application of the rule could be avoided by surrendering for adoption, or abandoning one's child, and where the creation and maintenance of this basic human relation is punished by professional exclusion, economic deprivation, and the stigma of inferiority, which punishment falls on child and mother alike.

3. Whether a rule barring employment of parents of out-of-wedlock children in a public school system is invalid under the Fourteenth Amendment as a sex-based classification, where the rule has, in fact, been enforced only against women, and the manner of enforcing the rule is so designed that unwed fathers would never be touched, and the historic discriminatory condemnation of only unwed mothers perpetuated.

4. Whether a rule barring employment of parents of out-of-wedlock children in a public school system is invalid under the Fourteenth Amendment as a race-based classification where the rule has in fact been enforced only against Black women, where the statistical facts in the geographical area affected relating to illegitimacy and nurturance show that it would never be applied to members of the white race, and where the disparate patterns of illegitimacy are a legacy of earlier attempts through legal means to destroy family life among the Black population.

5. Whether a rule barring employment of parents of out-of-wedlock children in a public system is invalid under the Fourteenth Amendment as a race-based classification where it has the effect of stigmatizing a high percentage of Black children attending public school and generating feelings of inferiority which interfere with the education of Black children.

6. Whether a rule barring employment of parents of out-of-wedlock children in a public school system is invalid under the Fourteenth Amendment to the Constitution where it has the necessary effect of punishing the refusal or inability to use contraception or to obtain an abortion.

7. Whether in view of the confluence of basic rights threatened by the rule—the right of nurturance, the right not to be discriminated against on grounds of race and sex, and the right to freedom of choice on the matters of contraception or abortion—a governmental regulation affecting such rights is not subject to the strictest of scrutiny.

Counter-Statement of the Facts

In their statement of the case, petitioners have supplanted the true facts in this record with a wholly one-sided presentation. Respondents accordingly present this counter-statement of the case.

On May 28, 1969, the Drew Municipal Separate School District, located within Sunflower County, Mississippi, was ordered desegregated by the United States District Court for the Northern District of Mississippi. In the school year 1971-72, George Ferris Pettey, Superintendent of the Drew Public Schools orally promulgated a new rule barring employment to any person who "had been

a parent of an illegitimate child" (Trial transcript [hereinafter "Tr."], 3/16, Pettey, 3).[1]

Respondents Katie Mae Andrews and Lestine Rogers, both Black females who were barred from employment as teacher aides solely because of the operation of this rule, brought this action under 42 U.S.C., §§ 1981 and 1983, Title VI of the Civil Rights Act of 1964, 42 U.S.C., § 2000(d), *et seq.*, and the Fifth and Fourteenth Amendments to the Constitution of the United States.

Respondent Andrews[2] was a 1972 graduate of Mississippi Valley State University and was certified as a teacher holding a Class "A" certificate which licensed her to teach in any public school in the State of Mississippi (Tr., 3/20, 49). She applied to Drew for a position as a teacher aide (the only position available) and was not hired solely on account of the operation of Mr. Pettey's regulation (Tr. 3/16, McCorkle, 15-16, 24). Had she been employed at Drew as a teacher aide, her college education would have entitled her to a monthly salary of $450 (*id.* at 9). Instead, though trained as a teacher, she had to take night shift factory work at a distance from her home (Tr. 3/20, 55, 56).

Respondent Rogers was a 1971 Drew High School graduate who had been employed as a teacher aide in the School District for the year 1971-72, at a salary of

[1] A deferred appendix is being filed herein. Accordingly, all references are to the record. In the main, the record consists of a trial transcript which is separately paginated for the different dates on which the trial was had (March 16, 19, and 20, and May 31, 1973), as well as depositions which were introduced at the trial. Since the March 16 transcript has two separately paginated sections, references to those transcripts will also include reference to the witness whose testimony is the source of a particular statement.

[2] Since the initiation of this lawsuit Ms. Andrews married Mr. Lonzo Peacock. Hereafter she will be referred to as Ms. Peacock.

$250 a month (Tr. 3/16, McCorkle, 18-19). At the time she was first hired, she was an unwed parent (Tr. 3/20, 36), but there was no issue as to her employability on that account. However, upon the pronouncement by Mr. Pettey of his rule in the following year, Ms. Rogers was not reemployed solely because she was an unwed parent (Tr. 3/16, McCorkle, 19) and was thereby forced onto the welfare roles in order to provide for her child (Tr. 3/20, 43).

Both Ms. Peacock and Ms. Rogers, life-long residents of Drew, resided with the parents, siblings, and their own children in the respective family homes (*id.* at 42, 59). The District Court emphasized that the record showed that the plaintiffs had never attempted to "publicize their status" or to proselytize students; the Circuit Court made the same observation (Cert. Pet., App. 13, 23).

It was conceded by Ms. McCorkle, who interviewed for hiring purposes that, except for Mr. Pettey's rule, both respondents were in all respects fully qualified for the positions they respectively sought or held and that the sole basis for the denial of employment in the case of Ms. Peacock and the refusal to renew the contract in the case of Ms. Rogers was that each had had a child out of wedlock (Tr. 3/16, McCorkle, 14, 19).

In addition to respondents, three other Black women who had been employed in the Drew School System during the 1971-72 school year were also denied further employment, solely on the basis of their status as unwed parents: Ms. Betty Barnes, who like Ms. Peacock was a holder of a Class "A" certificate (Tr. 3/20, 4), and had been employed as a substitute teacher (Tr. 3/16, McCorkle, 41); Ms. Rosie Dean Mays, and Ms. Violet Burnett, both of whom had been teacher aides (*id.* at 42).

These five Black women were the only victims of Mr. Pettey's rule.

Mr. Pettey's Rule: Its Origin, Scope, and Application

Though four of these five women had been employed during the first year of Mr. Pettey's tenure at Drew, promulgation of the rule was completely unrelated to any complaint about their teaching or their unwed parent status. Mr. Pettey spontaneously created the rule simply upon learning the fact that unwed mothers were employed in the Drew schools (Tr. 3/16, Pettey, 10). He admitted that he relied on no educational authority supporting the utility of such an exclusion (*id.* at 24); nor did he consult with anyone or advise or seek the approval of the School Board (*id.* at 10, 16-17).[3] It was not until after this lawsuit was instituted that the School Board ratified the rule (*id.* at 16-17). The District Court found that "[t]he challenged rule was without question the brainchild of Superintendent Pettey arising from long-held personal convictions concerning the morality of school employees . . ." (Cert. Pet. App. 22).

The regulation, as delineated by Mr. Pettey at the trial, excluded from employment any unwed parent, regardless of when the birth occurred, the circumstances surrounding the pregnancy or birth, or the fact that the unwed parent may subsequently have married. The fact of unwed parenthood was in Mr. Pettey's opinion a "conclusive" basis for denying employment.[4]

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[3] Petitioners' statement that the rule "had been formulated based upon the distilled wisdom of educators and others possessing expertise in this field" (Petitioner's Brief (hereafter Pb) 10) is without foundation in the record.

[4] "The Court: . . . Suppose a woman had an illegitimate child and then later married either the father of the child or another man. When she presented herself to you she showed she was married and had a child, one child. Would you consider her for employment?

The Witness [Pettey]: No, sir, I would not.

* * * *

[Footnote continued on following page]

Mr. Pettey applied the rule, not simply to teaching personnel, as petitioners would have this Court believe, but to almost every job classification within the School District, including teachers, teacher aides, cafeteria operators, dietitians,[5] librarians, gym teachers, secretaries, principals, P.T.A. presidents, nurses, social workers, and voluntary workers (Tr. 3/16, Pettey, 22-23). Indeed, the only school personnel Pettey wasn't sure of including within his rule were janitors and school bus drivers (*id.* at 22).

Petitioners' claim is that the rule was aimed and applied equally to male and female and to Blacks and whites (*id.* at 6). Yet the rule in its application has only excluded Black females (Tr. 3/16, McCorkle, 44, 45).

The fact that the rule had impact on women only was plainly the result of its design and the method by which it was enforced. Mr. Pettey readily acknowledged that it is "easier to find an unwed mother than an unwed father . . . [b]ecause the unwed mother is stuck with the result" (Tr. 3/16, Pettey, 24). Indeed, at one point in his testimony, he acknowledged that his direction to Ms. McCorkle was to apply the rule to unwed "mothers" (*id.* at 29).

The Court: Mr. Pettey, you do not think the facts or circumstances under which an illegitimate birth occurred is at all relevant to the issue of good character or bad character?

The Witness: No, sir. That would be hard to get at. I think the fact that the birth occurred without the benefit of matrimony is, to me, proof enough of the——

The Court: Is conclusive?

The Witness: Yes, sir." (Tr. 3/16/ , Pettey, 20-21, 28)

[5] "The Court: What about a cafeteria operator, a dietitian?

The Witness [Pettey]: Well, I wouldn't knowingly employ one. An individual who was—had that responsibility of preparing food or any capacity where there was considerable responsibility." (Tr. 3/16, Pettey, 6)

But Mr. Pettey gave no special instructions to Ms. McCorkle as to a method for investigating to identify unwed fathers (*id.* at 25).

Applicants for employment were not asked to disclose whether they were parents of out-of-wedlock children; they were asked only whether they were married and whether they had children. These questions obviously in no way distinguished among single parents who are unwed, divorced, widowed, or have adopted their child. Enforcement of the rule following the filing of the application was the result of informal, personal investigation by Ms. McCorkle, coordinator of elementary education (Tr. 3/16, McCorkle, 6), and Ms. McCorkle in her own testimony explained that she would know that a male had no illegitimate children because "he is married" (Tr. 3/16, McCorkle, 52).[6]

The differential impact of Mr. Pettey's rule as between Blacks and whites was a necessary consequence of both the method of enforcing the rule and the different patterns as between Blacks and whites of surrendering their children for adoption.

The City of Drew has a Black population of 47% (1970 Census of Population, Vol. 1, part 26, "Characteristics of Population, Mississippi," Table 16, U.S. Dept. of Commerce (1973)) and the public school population is approximately 80% Black (Tr. 3/16, Pettey, 27). Statistics prepared by the Mississippi State Board of Health established that in the five year period 1967-71 for every 47 illegitimate children in Sunflower County (in which

[6] Mr. Pettey's testimony, it will be recalled, was to the effect that marriage, even to the other parent of the child, did not cure the impact of unwed parenthood (*supra*, p. 6).

Drew is located) one is white and 46 are Black.[7] Although the ratio of Black to white unwed mothers is very likely not the same as that of Black to white illegitimate children, it is obvious, despite different rates of natality, that there are overwhelmingly more Black than white unwed mothers in that County.

The difference in the impact of Mr. Pettey's rule on the Black and white population is heightened by the further fact that Black women are far more likely to raise out-of-wedlock children than are white unwed mothers, to the extent of a differential ratio of up to 20 to 1.[8] Applying the nationwide adoptability figures for Black and white children, it can be estimated that for every white out-of-wedlock child living with his/her parent in Sunflower County, there are 144 Black children. Given the small number of white out-of-wedlock children residing with a biological parent in the County

[7] The figures prepared by the Mississippi Board of Health, the tabulation of which is set forth below, appear in Exhibit 3 in the record of this case.

Sunflower Co., Mississippi
Illegitimacy by Race

Year	White Live Births	Illegitimate		Non-White Live Births	Illegitimate	
		No.	%		No.	%
1967	178	7	3.9	773	273	35.3
1968	192	7	3.6	802	310	38.6
1969	208	6	2.9	746	291	39
1970	197	5	2.5	716	293	40.9
1971	211	8	3.8	709	316	44.6

[8] "Possibly as many as 70% of all white illegitimate children are given for adoption, but only between 3 and 5% of non-white illegitimate children are adopted." Bureau of Public Assistance, U.S. Dept. of Health, Education & Welfare, *Illegitimacy and its Impact on the Aid to Dependent Children Program*, 35-36 (1960), quoted in H. Krause, *Illegitimacy: Law and Social Policy*, 258-59 (Bobbs-Merrill 1971).

as a whole, it is purely speculative whether one white unwed mother or her child resides in the City of Drew.

The testimony of a defense witness bears out these facts. Ms. Ruby Stancil, lifelong white resident of Drew, indicated that she knew of not one white unwed mother in the City (Tr. 5/31, 104), though the statistics establish that illegitimate births are not unknown to the white community there (*supra*, fn. 7, p. 9).

The combination of the enormous difference between whites and Blacks in illegitimacy rates and the equally dramatic difference patterns of nurturance means that while Black unwed mothers could readily be found by Ms. McCorkle's "investigations", no such unwed white parent was found, or would be likely to be, and that the rule is thus solely directed at Black women.

The Claimed Rationale for the Rule and the Expert Testimony Introduced by Both Respondents and Petitioners

Petitioners' claimed rationale for the rule, as summarized by the District Court, was that 1) the bearing of an illegitimate child, no matter when it took place or under what circumstances, is conclusive proof of parent immorality or bad moral character and therefore is a proper basis for precluding the employment of such person in an educational environment; and 2) the employment of a parent of an illegitimate child in a school may "enhance the likelihood" of schoolgirl pregnancies because of the importance of "'role modeling" and the need for teachers to project a "proper" image to students.

But Mr. Pettey readily admitted that he could show no direct relationship between schoolgirl pregnancies and unwed teachers, and he had no "scientific basis" for his view that unwed mothers who are teachers would "breed unwed schoolgirls" (Tr. 3/16, Pettey, 24). He also admitted

that he had no sociological evidence that the morality of students would be affected by their being taught by an unwed mother (*id.* at 24, 26). Though Mr. Pettey had no proof, studies, data, documents or other evidence supporting his rule, he had a "feeling" that the rule would create a proper moral climate for the minority disadvantaged child and reduce schoolgirl pregnancies (*id.* at 30).

Despite the absence of any problems associated with the four unwed mothers who had been teaching and despite the admitted lack of scientific or other basis at the time of the enunciation of the rule, petitioners at the trial and at depositions sought to sustain their position by opinion testimony of two persons claimed to be experts, as follows:

1) Dr. Benjamin Hal Buchanan, Dean of the School of Education at Delta State University, had held various educational administrative positions within the school system of the State. Without reference to any studies or sociological data, he expressed his opinion that teaching by unwed teachers was harmful because "the psychological makeup of this teacher has been steeped in whatever ethic or code of morality that this teacher subscribes to . . . [and would] have an effect on the teaching effectiveness of the teacher (Tr. 5/31, Buchanan, 38). He acknowledged he had done no studies to justify his opinions (*id.* at 45), nor had he done any studies on unwed mothers as students or teachers (*id.* at 45-46), nor on the impact of unwed motherhood (*id.* at 48-49), and had not studied any items or documents on "the ability of the unwed mother to teach" (*id.* at 49). He noted, however, that unwed parenthood had no effect upon the ability, kindness, or gentleness of an educator (*id.* at 38).

The thrust of his opinion was his statement, "I know that it's morally wrong, according to all of the ethics

that I have ever read and studied, according to the Bible and according to every other background, philosophical way of thinking that I know of" (*id.* at 51). Like Mr. Pettey, he believed that "[n]o matter how it occurred, no matter where, when or how, any person that has a child out of wedlock has a moral or character detriment" (*id.* at 63). But apparently, unlike Mr. Pettey, Dr. Buchanan believed that if an unwed parent "dedicates his life to Christ, the Gospel," he can become "something else", possibly become a minister or teacher (*id.* at 64-65), and indeed "purge himself" (*id.* at 67). Dr. Buchanan had not been aware of the fact that both Ms. Peacock and Ms. Rogers are "deeply involved in their church" (*id.* at 64) and that persons had testified that "they have fine character in their community" (*id.* at 67). He was much impressed by those facts and evidently felt that, whatever their previous conduct, they had the "power to correct all difficulties," "could gain the respect of their community," and could be "extremely effective in anything they did" (*id.* at 75).[9]

Dr. Buchanan was a member of the board of directors of a home for unwed mothers (*id.* at 78), but it was an all-white home (*id.* at 86) and he obviously had little acquaintanceship with the Black community, particularly in the area of unwed parenthood (*id.* at 87).

2) Petitioners place heaviest reliance (Pb pp. 5-9) on the testimony of Dr. Ernest van den Haag, whose

[9] Respondent Peacock's views on the matter of repentance are not dissimilar from Dr. Buchanan's: "Well, it's wrong, but you can go to the altar and repent. The Bible say repent. It's a sin. You can repent for your sin and be forgiven." (Tr. 3/20, 60.) However, she felt quite differently about abortion (which was a way of overcoming Mr. Pettey's rule), which she believes would have brought about eternal damnation (*id.* at 59).

deposition was offered in evidence. He acknowledged that "it is impossible . . . to regulate whether a prospective teacher has extra- or premarital sex" (Dep. 30); he opined that teachers who were unwed parents were improper "'models" for students (*id.* at 11) but he admitted that he knew of no "studies which support [his] point of view" (*id.* at 44, 45) and insisted that "such studies are impossible in the nature of the matter" (*id.* at 46), basing his opinion on his "psychoanalytic experience" (*id.* at 47).[10]

It further developed that Dr. van den Haag's view of the impact of teacher conduct upon students depended upon "the extent to which they are aware of this conduct" (*id.* at 44). Upon being asked to apply his analysis to Drew, he stated "[t]he trouble is I have never been in Drew" (*id.* at 13), and then formulated his entire opinion on an "assumption" that since "we are dealing here . . . with a small town and with a small school," the status of unwed parenthood "would become known to the pupils" (*ibid.*) and "the teacher would be compelled, I would say, to tell the children that it is all right to have children out of wedlock" (*id.* at 17-18). He admitted that if his assumption was incorrect, "if a situation is not known, it would have no effect" (*id.* at 13).

No testimony confirming Dr. van den Haag's assumption appears in the record, despite the fact that of the five

[10] Dr. van den Haag's claimed expertise is not in the field of education. He asserted that he was a psychoanalyst and specialist in sociological psychology (Dep. 3). He has "never attended a school of education" (*id.* at 33) or "received a degree in education" (*ibid.*). He had never taught in elementary school, junior high school, senior high school, or pre-school (*id.* at 35-36).

Respondents in court had objected to the witness's authority to testify as an expert (Tr. 5/31, 118; Dep. 41), and though the lower court reserved decision on this issue, it never ruled on the objection.

persons affected by the rule, four had previously been employed in the Drew school system for varying periods.

The District Court made an express finding that there had been no proof of knowledge by the school children or proselytization on the issue of unwed parenthood by the plaintiffs (Cert. Pet. App. 33). The Court also refused to accept the speculations of the experts that school children would be apt to seek out or infer knowledge of plaintiffs' unwed status (*ibid.*). The Circuit Court agreed with these findings, and stressed the implausibility of children inferring such knowledge, given respondents' residence with their parents and siblings (Cert. Pet. App. 13).

Dr. van den Haag's view that the rule was not sexually discriminatory was based upon a plain misstatement of the rule which counsel for the petitioners strangely supported. The witness stated his understanding of the rule to be that the teacher being employed is asked, "Are you or are you not a parent of a child out of wedlock?", and he contended that either a male or female could answer that question truthfully or could lie (Dep. 31-32). Since he assumed that enforcement was based purely upon the answer to the form, he of course paid no attention to the fact that it was the woman who "is stuck with the result." In fact, there is no question on the form inquiring as to unwed parenthood and the sole basis for enforcement of the rule is Ms. McCorkle's "investigation" (*supra*, p. 8).

Dr. van den Haag's view that the rule was not racially discriminatory was similarly based upon his lack of knowledge of the facts and the community. His statement, "If it's applied equally, I think the chances of a white or black being an unwed parent are about equal" (Dep. 65), is completely at odds with the statistical showing of the

overwhelming differential between Blacks and Whites in this respect in Sunflower County (*supra*, p. 9).[11]

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[11] It appears in the record that Dr. van den Haag is devoted to the idea that Blacks are genetically inferior to whites and indeed is somewhat an ideologue of that point of view as well as of the need to separate races in education. In the course of his deposition he admitted to having written the following:

> "Unequal scholastic opportunity, segregated or otherwise, in no way accounts for unequal achievement." (Dep. 51.)
>
> "The family background of students determines academic achievement. The school does not." (*Ibid.*)
>
> "There is no reason to believe that God ever was an Equalitarian." (*Id.* at 59.)
>
> "[T]he quality of education can be improved for all—only if people are separated according to ability, and this very largely means race" (*Id.* at 56-57).
> 56-57.)
>
> "[T]he quality of education is best and perhaps only improved if pupils are sparated according to their ability, and that, at the present time, ability, as measured by I.Q., does follow racial lines often, at least, on the average." (*Id.* at 57.)
>
> "Instruction in schools for Negroes should attempt to remedy the disadvantages suffered by students coming from a culturally deprived home environment. This cannot be done except by separate education." (*Ibid.*)
>
> "[V]ariance in the measurable intelligence of individuals is largely genetic, and . . . might explain differences in academic performance." (*Id.* at 52.)
>
> "[I]f there is a genetic difference between white and Negro intelligence, the admixture suggests that American Negroes ,though less intelligent than whites." (*Id.* at 59-60.)

Dr. van den Haag explained his theory on this point further, as follows:

> "I believe that one of the attacks against Arthur Jensen's theory was that he tested and relied on the tests made with American Negroes, and that these American Negroes were not racially pure but rather there was about thirty percent mixture of white genes.

[Footnote continued on following page]

The foregoing is the entire expert testimony in support of Mr. Pettey's rule. It should be observed that no testimony was presented to support application of the rule to the numerous classifications of school employees, including "dieticians", to whom the rule applied; that Dr. Buchanan was at odds with Mr. Pettey on the matter of non-repentance; that even Dr. van den Haag seemed surprised that the rule applied even if the unwed parent marries the other parent of the child;[12] and that the role modeling theory was wholly unsupported by proof of knowledge by the students of the unwed parenthood of their teachers, let alone the lack of reference to any studies which demonstrate or even allow inferences that unwed teachers, by their sheer presence in the classroom, would in any way influence the sexual, reproductive, or parental activities of their students.

Respondents presented a series of witnesses of unquestioned expertise in the field of education.

Dr. Edmund Gordon, Professor of Education at Columbia Teacher's College, author of numerous textbooks and articles regarding elementary and secondary education, former research director for the national preschool program Project Headstart, and an ordained Presbyterian

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"Now, I pointed out that since the tests found on the average the measured intelligence—measured to the I.Q., to be between ten and fifteen points below that of whites. Then to indicate that the tested blacks had admixture of thirty percent of white genes, would simply mean that if they didn't have that admixture, the difference between their tested intelligence and that of whites, would have been even wider." (*Id.* at 60-61.)

[12] As he stated in depositions:

"You want to know what I think about the effects of hiring a teacher who has had a child out of wedlock and then marries. Now, you haven't told me whether he or she marries the parent of the child or someone else, or does it matter?" (Dep. 12.)

minister (Dep. 3-8), sought to give some content to the "role modeling" concept:

> "Role modeling is quite specific and there are very, very few situations that I can conceive of where teachers' marital status, parental status or sexual behavior constitutes a target behavior that they are modeling in school.
>
> "The aspects of their behavior that youngsters are much more likely to be influenced by have to do with the relationships between the youngster and the teacher, the way in which the youngster feels about this person's treatment of him or her, the extent to which the youngster sees himself or herself respected by the person.
>
> "Now, if one is arguing that the unwed parent is modeling unwed parenthood, one shall also have to establish the fact that this was, number one, known; number two, that the youngster or youngsters involved were using the teacher as a role model for parenthood or marriage or any one of those attributes." (*Id.* at 12.)
>
> * * * * *
>
> "So, again, the research on the subject would seem to suggest that the most pertinent influence on moral and academic development is the home; that schools can have an influence on the development of specific academic skills, and that they tend to have relatively little impact on the so-called moral development of youngsters." (*Id.* at 25.)

Indeed he said, "we have no evidence that the nature of the school experience makes any difference with respect

to the moral development of youngsters" (*id.* at 24).[13] Addressing the so-called moral implications of Mr. Pettey's rule, Dr. Gordon stated:

> "Morality does not adhere to parenthood. I think morality, if it adheres to any part of the process, adheres to the act of conception.
>
> * * * * *
>
> "But it doesn't sound as if your school district now is setting up sexuality, fornication, as its task, which is the implied basis for the morality. What they are saying is that if you are stupid enough or honest enough or religious enough to bear a child, having conceived it, then you are immoral." (*Id.* at 19.)

Dr. Gordon further questioned how the Drew School District could distinguish between the relative immorality of the unwed mother and the person who, after becoming pregnant out of wedlock, aborts her child (*id.* at 18). He also noted recent studies which indicated that better than 50% of our population is thought to participate in out-of-wedlock intercourse (*id.* at 19). Hence he noted that the sole application of the rule to unwed parenthood, as distinguished from extramarital sexual activity, was inconsistent with the trends of sexual

[13] Dr. Gordon did not identify them, but among the recognized studies directed specifically to this question are Mussen, "Early Sex-Role Development" and Hill and Aldous, "Socialization for Marriage and Parenthood," *Handbook of Socialization Theory and Practice*, Goslin (ed.) (Rand-McNally, 1969); Harrison and Westerman, "An Assessment of Teacher Influence," 48, *The Clearing House*, 223 (Dec. 1973); Jencks, *Inequality: A Reassessment of the Effect of Family and Schooling in America* (Basic Books 1972), reporting that a study of parochial and public school alumni found them to have almost indistinguishable attitudes on most issues, notwithstanding the more explicit moral training experienced by the parochial school children.

activity prevalent within society (*id.* at 20). Dr. Gordon concluded that the rule failed to take into account the many circumstances causing a particular person to become pregnant and bear a child. Hence as a "professor and a psychologist and a minister", he reasoned that judgments of character based solely on childbirth are inappropriate since they ignore the many factors contributing to that result (*id.* at 34).

Dr. Kenneth B. Clark, probably the most outstanding expert in the field of discrimination in education, whose expert testimony was relied upon by this Court in *Brown* v. *Board of Education*, 347 U.S. 483, 494 (1954), also testified on behalf of the respondents. He stated:

> "I do not see that unwed parenthood in itself interferes with either the technical academic competence of teachers or the ability of a teacher to communicate to students the genuine acceptance of the humanity of those students or qualities of kindness, sensitivity and love.
>
> "I don't see how unwed parenthood in itself can do that any more than divorce can do it, or separation, or being unmarried.
>
> "I, for my own, do not see where any of these factors operating in terms of themselves can or do in any way influence the effectiveness of the teacher." (Dep. 14-15.)

He made clear that:

> ". . . unwed parenthood for the most part reflects the inability or the lack of knowledge of the—on the part of the female, for the most part, or the male, as to how to avoid unwed parenthood, if it is undesired.
>
> "The evidence is very clear that it has nothing to do with morality, it has nothing to do with sexual

behavior; it has to do only with the degree of sophistication necessary to control this consequence, this particular consequence of heterosexual behavior. (*Id.* at 17-18.)

Dr. Clark expressed his view that it is:

". . . very spurious, [and] misleading [to state that] unwed parents are unable to teach good moral values. . . [A]nyone who says this is either deliberately misleading his audience or is ignorant. There is just absolutely no basis for making that statement." (*Id.* at 19.)

He drew upon his experiences and stated that, except where it is "deliberately imposed" (*id.* at 20), "children are not generally involved [in] or have direct or specific knowledge of the sex lives of their parents, much less their teachers" (*id.* at 20-21). Finally, he confirmed that he did not know of any "educational studies or reports or treatises, or whatever, that show that unwed parenthood has a detrimental effect on students" (*id.* at 23). As to the influence of an unwed parent teacher on schoolgirl pregnancies, he said, "I am sorry, I just can't take that seriously" (*id.* at 25).

Indeed, Dr. Clark saw not only no "positive educational reason or purpose for such a rule" but stated that it is "essentially a punitive rule rather than an educational rule" because of its sex-discriminatory character explaining (*id.* at 10):

"[O]nly the female would be punished or excluded or blocked from participating in an important social process while the male, while technically being as, quote, guilty as the female would nonetheless be unpunished." (*Id.* at 10.)

* * * * *

"[T]he historical reason is that our society does have a long history of discrimination against females on matters of sex and sexual behavior. These rules and regulations are generally made by males, enforced by males, and they would seem for the most part designed to subordinate females to an essentially inferior role, which the power of our society is mobilized to reinforce.

"It is clearly a male dominating approach to human problems and human behavior." (*Id.* at 10-11.)

Finally, he stressed its pervasive stigmatizing effect:

Q. In a community where you have a large number of black children, say, eighty per cent black children in the school district, and you also have a large percentage of children born in that area being born to unwed parents, do you see any detrimental effect that a rule like this could have on, say, black children?

A. . . . [T]he only purpose that I can see for such a rule is a punitive one, that it is a rule that comes out of a history of Puritanistic punitiveness, it comes out of an intentional or unintentional discriminatory punitiveness directed toward females.

It is a dehumanizing rule in that it imposes upon human beings a stigma which to me is absolutely unnecessary, except in terms of cruelty.

It imposes a stigma, an unnecessary stigma, upon the children who are the products of, quotes, the unwed situation of the mother, and it imposes a discriminatory cruelty upon the mother.

I see no other function for such a rule. It certainly has no intrinsic educational function.

> It has no social function. It has, as far as I can see, only a dehumanizing and stigmatizing function. (*Id.* at 26-27.)

Dr. Ronald G. Samuda, Assistant Professor of Education at Columbia Teacher's College, a former high school and elementary school teacher and vice-principal, and author of various educational articles, testified at length concerning the nature of the rule and its impact upon various groups. Initially he noted that the rule illogically infers an unacceptable moral condition from the fact of unwed childbirth (Tr. 3/19, 5): "[H]aving a child is not a moral event, it is a biological and physiological fact. . . But if we say then that a person who cohabits or who has had sexual intercourse, that is to say, premarital sex or extramarital sex, is an immoral person, then we would also be condemning a great majority of the practicing teachers throughout the country who indeed have participated in extramarital sex." (*Ibid.*)

Dr. Samuda stated:

> "The point I want to make here is that the moral value is being placed, in my opinion, in this particular controversy, not upon the fact of childbirth but upon the intermediary between sexuality and childbirth, namely that of contraception or abortion, and therefore, in my opinion, it is an absurd position." (*Id.* at 9.)

In fact, he claimed that the moral values of "black communities are far more rigid than that of the upper middle class" (*id.* at 6), so that the differential application of the rule depended upon whether the teacher "has access to the pill" (*id.* at 32), but had nothing to do with morality (*ibid.*).

Further he noted that the application of the rule would be discriminatory as to Black teachers where Blacks represented a substantially larger proportion of the total

unwed parents within a community (*id.* at 17). Additionally, only women would be the subject of the rule's application because male involvement and identity are extremely difficult to prove or assert (*id.* at 18-19).

The unwed parent could be both a good teacher and proper role model for students, for as Dr. Samuda noted, unwed parenthood was merely evidence of having cohabited once in a lifetime (*id.* at 7). On the issue of role modeling, Dr. Samuda, citing other writers, explained that a prestigious person, engaging in direct, observable conduct or proselytizing such conduct, is engaged in role modeling. In the absence, however, of such direct, observable conduct and proselytizing by a person of some prestige, there can be no role modeling (*id.* at 13).

Additionally, Dr. Samuda described experiments of educators where attempts were made to teach children moral values and he concluded, "the experiments have largely failed" (*id.* at 29). Hence, Dr. Samuda observed, many educational authorities have concluded that such moral values are taught primarily in the home (*ibid.*).

Ms. Fannie Lou Hamer was called and qualified to testify as a sociological expert on the views of Black people in Sunflower County regarding Mr. Pettey's rule and the Black community's feeling pertaining to unwed parenthood (Tr. 3/20, 72, 77). Ms. Hamer, a lifelong resident of Sunflower County, had for years distinguished herself as a community and civil rights activist, particularly in the areas of voting rights and school desegregation. Among her many awards are honorary doctorates of humanities from several educational institutions (*id.* at 71).

In describing the views of Sunflower County Blacks on unwed parenthood, she stated that such behavior was not

encouraged but, on the other hand, it was not "looked down upon" (*id.* at 80). She believed that the community had great respect for those young women who, after bearing children out of wedlock, returned to school to get an education or a better job, or otherwise sought gainful employment to avoid the welfare rolls (*id.* at 80, 102). As an example, she noted that Ms. Peacock had a fine reputation in her community, primarily because of her own effort, and that of older people in the community who helped her, to further her education (*id.* at 90).

Ms. Hamer described community opinion concerning unwed parents by noting that no one in the Black community felt there was anything wrong with unwed mothers teaching in the public schools (*id.* at 82, 91). This view was further supported by her assertion that values were taught in the home and that, as a parent, she molded the moral development of her children, as did other parents (*id.* at 100). She believed that moral values in Sunflower County were taught in the home and not in the classroom (*id.* at 84).

As concerned the scope of the rule, Ms. Hamer believed that if immoral conduct was what the rule was driving at, "[n]obody would teach" (*id.* at 95). The thrust of Ms. Hamer's testimony, however, related to the community-wide view of its effect upon many Black women. She noted that the rule would result in wholesale job loss, particularly among young Black women (*id.* at 80). Consequently, many Black people would be forced on welfare (*ibid.*) or forced, in order to find work, to leave the community in which they were born and raised (*id.* at 97). Further, she personally opposed abortion on religious grounds (*id.* at 82).

Ms. Hamer felt the rule would stigmatize the progeny of unwed parents by "saying to the child that it, too, is not fit" (*id.* at 81). Primarily, however, she saw the

rule as an economic and political method further to castigate Blacks as inferior and further to relegate them to subordinate status, stating:

> "You always tell us, we go through this thing with the welfare or we have got so many kids on the welfare roll, 'Why don't you get up and do something?' And then when we start doing something, 'You don't have any business being that high'" (*id.* at 95-96).[11]

The District Court's Opinion

The District Court fully recognized that "public school officials have the undoubted authority to adopt reasonable employee qualification criteria" but held Mr. Pettey's rule to be defective on two separate grounds:

1) "[T]he policy or practice of barring an otherwise qualified person from being employed, or considered for employment, in the public schools merely because of one's previously having had an illegitimate child has no rational relation to the objectives ostensibly sought to be achieved by the school officials and is fraught with invidious discrimination; thus, it is constitutionally defective under the traditional, and most lenient, standard of equal protection and violative of due process as well." (Cert. et. App. 25).

2) "Alternatively, the policy, both inherently and as applied, constitutes an impermissible, discriminatory classification based upon sex." (*Ibid.*)

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[11] Questioning by petitioners' counsel seemed to confirm Ms. Hamer's statement: "Isn't it a fact that there are not that many black students that plan to be teachers and go to school to be teachers?" (*Id.* at 92.)

The District Court did not reach the issues of race and privacy. On the first point—the lack of rational connection between immorality and unwed parenthood status—the District Court's analysis is clear:

> "The unconstitutional vice of the policy, as understood and enforced by Pettey, is that it conclusively presumes the parent's immorality or bad moral character from the single fact of a child born out of wedlock. By the rule, a parent, whether male or female, who has had such a child, would be forever precluded from employment. Thus, no consideration would be given to the subsequent marriage of the parent or to the length of time elapsed since the illegitimate birth, or to a person's reputation for good character in the community. A person could live an impeccable life, yet be barred as unfit for employment for an event, whether the result of indiscretion or not, occurring at any time in the past. But human experience refutes the dogmatic attitude inherent in such a policy against unwed parents. Can it be said that an engaged woman, who has premarital sex, becomes pregnant, and whose fiance dies or is killed prior to their marriage, is morally depraved for bearing the posthumous child? The rule allows no compassion for the person who has been unwittingly subjected to sexual relations through force, deceptive design or while under the influence of drugs or alcohol, yet chooses to have the child rather than to abort it. The rule makes no distinction between the sexual neophyte and the libertine. In short, the rule leaves no consideration for the multitudinous circumstances under which illegitimate childbirth may occur and which may have little, if any, bearing on the parent's present moral worth. A past biological event like childbirth out of wedlock, even if relevant to the

> issue, may not be controlling; and that it may be considered more conventional or circumspect for the infant to be surrendered to others for upbringing rather than be reared by the natural parent is hardly determinative of the matter. Furthermore, the policy, if based on moral judgment, has inherent if unintended defects or shortcomings. While obviously aimed at discouraging premarital sex relations, the policy's effect is apt to encourage abortion, which is itself staunchly opposed by some on ethical or moral grounds. It totally ignores, as a disqualification, the occurrence of extramarital sex activity, though thought of by many as a more serious basis for moral culpability. Indeed, the superintendent's fiat, altogether unsupported by sociological data, equates the single fact of illegitimate birth with irredeemable moral disease. Such a presumption is not only patently absurd, it is mischievous and prejudicial, requiring those who administer the policy to 'investigate' the parental status of school employees and prospective applicants. Where no stigma may have existed before, such inquisitions by overzealous officialdom can rapidly create it." (Cert. Pet. App. 28-30.)

The District Court found that the conclusive presumption analysis of *Stanley* v. *Illinois*, 405 U.S. 645 (1972), barred a conclusion that all unwed mothers were immoral. The Court said:

> "Granted that many unwed parents may be bereft of morality, and thus unfit for employment in public schools, the policy nonetheless does also bar those persons who, though unwed parents, may have unquestionably good character and high qualifications of job fitness. Since the rule operates arbitrarily and capriciously to prevent certain per-

> sons from receiving employment consideration, it constitutes an invidious discrimination and is violative of equal protection. The fact that the two plaintiffs, Ms. Andrews and Ms. Rogers, were either discharged or not considered for employment, without any inquiry whatsoever into their present good moral character but solely because of the stated policy, constitutes a denial of their due process rights." (Cert. Pet. App. 30-31.)

The District Court did not stop with conclusive presumption analysis, but rejected as lacking in any rational basis the suggestion by the petitioners that teachers with out-of-wedlock children constituted improper models which affected school children's attitudes toward unwed parenthood or a high percentage of schoolgirl pregnancies. The Court said:

> "As a second rationale for their rule, defendants urge that the mere presence of an unwed parent in an educational environment may likely adversely affect the morals of school children and enhance the likelihood of schoolgirl pregnancies. Assuming that libido can be taught in the classroom, there is no evidence that plaintiffs or others were attempting or would have attempted to proselytize students . . .
>
> "Defendants express serious concern about the importance of employee role modeling; that is, they assert it is imperative for teachers as well as other school employees to project a 'proper' image to students of impressionable age. We are compelled to once again emphasize that the record is devoid of evidence of proselytization. In the absence of overt, positive stimuli to which children can relate, we are convinced that the likelihood of inferred learning that unwed parenthood is necessarily good or praiseworthy, is highly improbable, if not speculative. We are not at all persuaded by defendants' suggestions, quite implausible in our view, that students are apt to seek out knowledge of the personal and private family life-styles of teachers or other adults within a school system (i.e., whether they are divorced, separated, happily married or single, etc.), and, when known, will approve of and seek to emulate them." (Cert. Pet. App. 32-33.)

The District Court then established as an alternative ground for its decision the fact that the rule "creates an inherently suspect classification based on sex, i.e., single women, which cannot survive strict scrutiny mandated by the Fourteenth Amendment" (*id* at 33) stating:

> "We note that only unmarried females have been prohibited from employment under the policy; and it is self-evident that the rule can only be applied against them. Although the rule professes to be neutral, proscribing employment of any parent, male or female, of an illegitimate child, the rule cannot operate that way. Unless the man either admits paternity or is so adjudged judicially, it is virtually impossible to prove his involvement. Nature does not readily, if ever, identify the offspring's sire. A woman, however, is impregnated, gives birth, and often raises the child alone. Mr. Pettey freely conceded that mothers of illegitimate children are easier to discover than fathers because, in his words 'the unwed mother is stuck with the result.' Further, although Ms. McCorkle emphatically stated that she would apply the rule equally to both male and female, when asked how she knew that a certain male teacher's aide had not fathered an illegitimate child, she replied, 'because he is married'." (Cert. Pet. App. 34.)

The District Court concluded that "[t]he essentially discriminatory effect of the Drew policy upon unmarried

women is inescapable" (Cert. Pet. App. 36). It found that the policy "cannot survive strict judicial scrutiny" (*id.* at 37).

The Circuit Court's Affirmance

The Circuit Court opinion affirmed the court below by application of only the first of the two alternate grounds of decision—namely, the lack of rational connection between the rule and any legitimate objectives of the School Board. The Circuit Court quoted extensively from the District Court's analysis and likewise rejected the rule as both establishing an impermissible conclusive presumption of immorality and as being devoid of any proven or plausible connection with school children's behavior or attitudes.

Summary of Argument

Mr. Pettey's rule is violative of due process and equal protection of the laws because, even if one were to apply the most minimal standards of review, it bears no rational relationship to a legitimate governmental interest. Analyzed according to its originally stated basis as a test of the "morality" of school employees, it is irrational because the basis of its operation is childbirth and nurturance, obviously not immoral, whereas no penality is visited at all upon pre- or extramarital sexual intercourse, the supposed evil underlying the regulation. Moreover, the ineligibility based on out-of-wedlock parentage is both capricious and irremediable. It takes no account of any of the circumstances of the conception, the lapse of time between the birth and the occasion for applying the rule or the individual's reputation in the community for good character. It permits of no repair of one's condemned status; not even by the subsequent marriage of the offending parents. Nor does the irrationality of the regulation diminish by viewing it as a regulation of the kind of "role-models" that are presented to school

children. Firstly, the regulation was applied to virtually all school personnel regardless of their relationship to students. And if the term "role-modeling" means anything other than "character" then by definition "role-modeling" requires that there be communicated to the school children the status of unwed parenthood as to which both lower courts held there was a complete failure of proof. The argument of the petitioners that the regulation would limit high school pregnancies was, as the Circuit Court said, "without support other than speculation and assertions of opinion." It is an argument which in other contexts has been presented to, and rejected by, this Court, and is designed merely to sustain a punitive, stigmatizing approach to unwed parenthood. Both lower courts made decisive findings of fact on the issues herein and petitioners seek to upset those findings, in violation of this Court's rule that concurrent findings of two courts below are final in the absence of very exceptional showing of error.

Mr. Pettey's rule invades and punishes the Constitutionally protected parent-child relationship in that it places pressure upon a parent to conceal, surrender, or abandon and not nurture a child. The interest of a parent in nurturing a child is an essential and basic right. That right applies to children born out of wedlock equally as to children born within the cloak of matrimony. His rule which excludes the caretaking parent of an out-of-wedlock child from employment is an impermissible burden upon the exercise of the right of nurturance. By barring employment to unwed mothers, the regulation imposes a financial penalty and stigma upon the illegitimate child as part of the economic unit of parent and child, a consequence rejected by this Court in a consistent line of cases.

Mr. Pettey's rule has been applied exclusively to women, and is in fact sex-based. Though men and

women equally share the responsibility for out-of-wedlock births, it is women, not men, who overwhelmingly nurture the illegitimate child. The design of the enforcement mechanism of the rule was such that the rule was applied only to the parent who nurtured the child, which would expectably be the female. No effort was made to ferret out males who sired out-of-wedlock children, and no procedure designed to achieve that was established, though it was self-evident that, absent such procedure, no males would ever be subjected to the regulation. The Pettey rule was thus structured and implemented so as to perpetuate the historic condemnation of only the female in the situation of unwed parentage.

Mr. Pettey's rule constitutes a race-based classification. It in fact has been exclusively applied to Blacks. In the geographical area where the rule is applied, the differential statistics as to white and Black rates of illegitimacy, when combined with the differential ratio of nuturance as between whites and Blacks, has the inevitable consequence that only Blacks and no whites would be affected by the rule. The Court has recognized that where racial disparity is, as here, overwhelming, a neutral appearance and assertions of racial neutrality do not overcome the reality. Moreover, the overwhelmingly disparate application of the rule to Blacks follows because the rule is built upon the effects of past discrimination and the destruction of Black family life which was once mandated and thenceforth perpetuated by law. The impact of the rule is particularly serious because it stigmatizes a high percentage of Black children in the school system. thereby generating the feelings of inferiority which this Court in *Brown* v. *Board of Education* found interfered with the education of Black children.

Finally, the Pettey rule punishes refusal or inability to employ contraception or to abort a fetus thereby

interfering with fundamental rights beyond the power of government. Earlier decisions by this Court recognizing a right to use contraception and to abort a fetus were based upon freedom of choice in areas fundamentally private. Such decisions may not be read as investing local government with the power to pressure resort (or punish non-resort) to abortion and contraception by withholding employment. Petitioners' argument regarding the power of government to protect and advance the institution of marriage ignores a consistent line of decisions establishing that such an interest of government does not permit it to intrude into such deeply personal matters as relate to contraception, abortion, child-bearing and parental rights to nurture children, including those born out-of-wedlock. Nor does it permit discriminatory and punitive treatment of unwed parents or their children as a means of buttressing the institution of marriage.

While the regulation here at issue is invalid by the most minimal standard of review and the most traditional test of rationality, the unusual confluence of right threatened by this regulation—including the rights of nurturance, the right to be free from discrimination on the grounds of race or sex, and the right ot freedom of choice in such matters as contraception and abortion,—requires the use of the strictest standard of review.

In other circumstances involving denial of public employment because of issues as to integrity or immorality or for other reasons which threaten fundamental and protected interests, individualized determination of these factors rather than generic determination is the minimum remedy required. The lower courts properly did not so provide in this case. Finding the rule to be dogmatically overinclusive and invidiously underinclusive and patently irrational, the lower courts set the rule aside as such. Moreover, they expressly prohibited using the content

of the rule—unwed parenthood—as a factor in any due process hearing that might be undertaken because they recognized that such hearings could not cure the basic constitutional defects of the rule and that they would themselves constitute a device and a forum for never-ending stigmatization of Black women and their children.

ARGUMENT

I.

The Pettey rule violates equal protection in that it bears no rational relationship to a legitimate Government interest.

This Court in *Perry* v. *Sinderman*, 408 U.S. 593 (1972), reiterated the settled principle that public employment in the school system may not be denied for reasons that infringe Constitutional interests, regardless of the absence of a claim of contractual right to such employment. See also, *Board of Regents* v. *Roth*, 408 U.S. 564 (1972); *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *Pickering* v. *Board of Education*, 391 U.S. 563 (1968); *Schware* v. *Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957). Consistent with these cases, the courts below found that Mr. Pettey's rule denied respondents due process and equal protection of the laws on the ground that the rule was totally irrational.

Even in the area of economic and social welfare legislation to which this Court has traditionally accorded the greatest deference, analysis of the conflicting claims of the government to regulate on the one hand and the citizen's assertion of rights on the other proceeds by weighing the governmental interest and the regulatory means employed, and the importance, nature and quality of the rights of the citizen which are affected.

"The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, but this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose . . .

. . . Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny . . . The essential inquiry in all the foregoing cases is, however, inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?" *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972).

And see, *e.g.*, *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973); *Stanley* v. *Illinois*, 405 U.S. 645 (1972); *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974). And in analyzing the nature of the "fundamental personal rights" entitled to protection, the Court has been particularly sensitive to regulations which discriminate against racial minorities, or are based on sex, or invade the private realm of personal and family life. *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Reed* v. *Reed*, 404 U.S. 71 (1971); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Stanley* v. *Illinois*, *supra*.

The rule here at issue which precludes employment of once unwed parents based on the illegitimate status of the child has effects which reach far beyond that of maligning "a person's good name, reputation, honor or

integrity," *Roth, supra*, 408 U.S. at 573,[15] and beyond even the deprivations invalidated in the prior "illegitimacy" decisions of this Court. In this case the classification based on illegitimacy, is wholly irrational and in addition by design and implementation, violates a confluence of four fundamental personal rights and interests consistently accorded the most scrupulous protection by this Court:

(1) It infringes one of the most sacred and private aspects of the family relationship—that between parent and child—by literally conditioning employment on the abandonment of one's child and thereby punishing the maintenance of the parent-child relationship;

(2) It constitutes a sex-based discrimination in that it ignores the father and punishes only the unwed mother who, by virtue not simply of biology but of legally reinforced cultural patterns, bears the responsibility for the care and nurturance of the out-of-wedlock child;

(3) It constitutes a race-based discrimination in that it falls exclusively on Black women and their children, perpetuating the terrible legacy of slavery and discrimination by punishing and stigmatizing illegitimacy; and

(4) By punishing the birth of the child of an unwed union, the rule operates to induce abortions and thereby invades the sphere of reproductive and religious freedom.

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[15] The seriousness of the attack upon the individual teacher's "good name, reputation, honor or integrity" as well as the quality of the interests affected (parenthood and the rights of illegitimate children and their parents versus "mode of dress and appearance") wholly distinguishes the instant case from *Miller* v. *School District No. 167, Cook County*, 495 F. 2d 658 (7th Cir., 1974).

The lower courts found it unnecessary to base their decisions upon the foregoing considerations,[16] because a detailed analysis of Mr. Pettey's rule showed that it could not be sustained upon the most elemental standard of rationality. His rule is simply beyond reason.

Accordingly, we first address an analysis of Mr. Pettey's rule as dealt with by the lower courts, and leave for later sections of this brief the development of the other fundamental, Constitutionally protected rights threatened by the rule.

The alleged "rationale" for Mr. Pettey's rule

The District Court analyzed what appear to have been three separate "rationales" offered by petitioners in support of Mr. Pettey's rule. The detailed examination by the lower courts, as well as an analysis of the record, reveals the complete absence of any rational basis for the rule.

a) *Morality*

Granting "that public school officials have the undoubted authority to adopt reasonable employee qualification criteria (including the possession of good character traits)" (Cert. Pet. App. 25), the District Court demonstrated that this rule had no relation to any such considerations for a series of reasons, including—

i) The rule selected a single fact—a child born out of wedlock—as forever establishing immorality, without regard to:

—The circumstances of the conception;

—Even the subsequent marriage of the couple;- - -

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[16] The District Court did hold, as an alternate ground for its decision, the classification to be sex-based.

—The lapse of time between the birth and the occasion for applying the rule; and

—The community reputation and past or present character or moral worth.[17]

—Classroom teaching history and demonstrated ability.

ii) The rule in fact encourages abortion, "which is staunchly opposed by some on ethical or moral grounds" (Cert. Pet. App. 30) and rewards abandonment (*ibid.*).

iii) The rule totally ignores extramarital sexual activity as a basis for disqualification, conduct thought by many to be "a more serious basis for moral culpability" than a birth (*ibid.*).

In the face of the foregoing analysis, an argument that the rule is related to "character" or "morality" is not only irrational, it is absurd. As a "morality" classification, the rule is demonstrably overinclusive and underinclusive. As the District Court quite properly pointed out, "[h]uman experience refutes the dogmatic attitude inherent in such a policy against unwed parents" (Cert. Pet. App. 29). Even the experts, brought in to bootstrap Mr. Pettey's rule into respectability, could not support his view of the parenting of a child out of wedlock, characterized by the District Court as an "irredeemable[18] moral disease" (*id.* at 30) (*supra*, pp. 12, 16).[19]

[17] Even the petitioners' witness, Dr. Buchanan, seemed to be taken aback that the rule permitted no repentance, which he observed was recogniged within the church (*supra*, p. 12).

Certainly that feature of Mr. Pettey's rule which would not even recognize a subsequent marriage between the parents as curing the effect of the allegedly immoral act takes the rule out of any penumbra of rationality.

Moreover, the rule is invidiously underinclusive. If subsequent marriage cannot cure the fault of unwed parenthood, it is clear, as the District Court recognized (*id.* at 30, 34), that the irredeemably "immoral" conduct is the prior pre- or extramarital sexual act. As a test of morality the rule cannot stand since it singles out single people who nurture their out-of-wedlock children, ignoring all those equally "guilty" who fortuitously or deliberately avoided conception, had an abortion, sired or bore a child of an extramarital union under the cover of matrimony, or abandoned their child. Mr. Justice Jackson's historic words in *Railway Express Agency* v. *New York*, 336 U.S. 106, 112 (1949), quoted recently by this Court in

[18] The Circuit Court noted that this Court had held in *Schware* v. *Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957), that if a State seeks to impose a burden upon individuals on considerations of character or morality it must look to *present*, not *past*, moral character (Cert. Pet. App. 9).

[19] Testifying on the question of good moral character, Mr. Pettey himself volunteered that a prerequisite to obtaining the teacher's certificate, held by Ms. Peacock and Ms. Barnes, is "that a superintendent or the dean of the school of education or major professor attest to the good moral character of the person applying for that license." (Tr. 3/16, Pettey, 8.) Indeed, Ms. Peacock was an unwed mother at the time she was so certified (Tr. 3/20, 50, 52). Dr. Buchanan testified that, with respect to good character, no inquiry into unwed parenthood status is made of student applicants to Delta State College, nor does the "Teacher Education Council" which prescribes the entry requirements have a policy on the matter (Tr. 5/31, 59-63).

Eisenstadt v. *Baird*, 405 U.S. 438, 454 (1972), are completely appropriate here:

> "The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow the officials to pick and choose only a few to whom they will apply legislation and thus escape the political retribution that might be visited upon them if larger numbers were effected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation." (Jackson, J., concurring).

We submit that it is irrational to suggest that a rule which encourages abortion—a practice that offends the moral sensibility of a significant segment of American society, *Roe* v. *Wade*, 410 U.S. 113, fns. 22 and 23 (1973)—can be justified on the grounds that it advances morality, at the same time that no action is taken with respect to extramarital sexual activity, the conduct supposedly the target of the regulation. It is further irrational to suggest that morality is determined by a policy that "the infant . . . be surrendered to others for upbringing rather than be reared by the natural parent" (Cert. Pet. App. 30). The rule begins to operate only when a non-marital pregnancy is not aborted. And once the stigma of the rule attahes—upon the birth and non-abandonment of the child—it can never be removed, not even by marriage, which the petitioners purport to exhort.

The lower courts did not reject a power of the local School Board to consider questions of morality. They both concluded, however, that the rule as promulgated

is so unrelated to morality that it simply could not stand up against the most minimum standards of rationality.

Perhaps because of the patent invalidity of their position, petitioners run from their "immorality" argument before this Court. Now they contend:

> "The rule . . . does not operate against the present moral status of an individual school teacher or teacher aide, but operates against the example which such a teacher or teacher aide provides the students in said school district." (Pb. 20)

Petitioners' retreat here echoes that of the school boards' in *Cleveland Board of Education* v. *LaFleur*, where they abandoned earlier asserted grounds based on "outmoded taboos" to support maternity regulations excluding teachers once they "began to show," *supra*, 414 U.S. at 641, n. 9. As Mr. Justice Powell pointed out in his concurring opinion: "The Boards do not advance this today as a legitimate objective, yet its initial primacy casts a shadow over these cases." *Id.* at 653.

b) *Role-modeling*

The second argument pressed by the petitioners is that in some fashion persons who had at one time in their lives become unwed parents were improper "role models" for the students. As the testimony of the rule's progenitor, Mr. Pettey, makes clear, role-modeling is but a sophisticated term for good moral character (*supra*, pp. 5-7). As developed by petitioners, the record affords no basis for any other conclusion.

First, petitioners never explain how this role-modeling theory applies to all those affected by the Pettey rule. Rather, petitioners carefully omitted from their presentation of this case [20] the fact that the rule applies to almost every form of employment in the school system, including not only teachers and teacher aides, but cafeteria operators, dieticians, librarians, gym teachers, secretaries, prin-

cipals, P.T.A. presidents, nurses, social workers, and voluntary workers (*supra*, p. 7). Mr. Pettey's expressed concern appears not to have been with their status as "role-models" but, as he said with respect to dieticians, with their "responsibility of preparing food or any capacity where there was considerable responsibility" (*ibid.* n. 5).

Whatever "role-modeling" means, by definition it requires that there be communicated to the individual who may be influenced by the "model" the fact of the status which is at issue. Unwed parenthood is not an attribute which is visible. Even if parenthood is known, its origins and the relationship of the parents to each other—whether they were ever married or, if so, whether there was a divorce, voluntary separation, desertion, or death—are not matters which are visible or even known to school children unless one of the actors takes steps to make them known. Beyond that, absent communication, it is implausible that the school child will both divine and understand the difference between a child born out of wedlock and one born to a married or once-married parent or adopted by a never-married parent.[21]

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[20] Petitioners' "Questions Presented" characterizes the rule as affecting "teachers and teacher aides" (Pb 2). Throughout their statement of the case and summary of argument, teachers, teacher aides, and persons in instructional positions are mentioned 44 times; no reference there or in any other section of the brief is made to all others excluded by the rule.

[21] The Bureau of the Census reports that 13.4% of all children are living with one parent only, but that only 1.3% are with never-wed parents. Even in the Black population there are five children living with one parent only for every one with a never-married parent. "Family Status of Persons Under 18 Years Old by Presence and Marital Status of Parents, Age and Race: 1970, U.S. Dept. of Commerce, Bureau of the Census, "Subject Reports: Persons by Family Characteristics" (1970). Thus the sheer fact that a parent is not presently married and lives alone with a child provides no basis for inference of illegitimacy. Beyond that, as the record demonstrates, respondents were living in their family homes with parents and siblings (*supra*, p. 5).

Every one of the expert witnesses who referred to "role-modeling" in this case—and this included the petitioners' one witness who dealt with it, Dr. van den Haag—emphasized that communication of status was the necessary prerequisite to any "role-modeling" (see *supra*, p. 13). Without communication of one's status, it becomes impossible to speak of role-modeling; we are then dealing with but another word for "character" or "morality." Petitioners, realizing the lack of viability of their justification supposedly based on "character," have therefore shifted to a new word formula—"role-modeling." The difficulty with their shift, however, is the failure of proof.

The District Court made a finding that (*supra*, p. 28):

> ". . . there is no evidence that plaintiffs or others were attempting or would have attempted to proselytize students. To the contrary, plaintiffs have never attempted to publicize their parental status.
>
> * * * * *
>
> "We are compelled to once again emphasize that the record is devoid of evidence of proselytization. In the absence of overt, *positive stimuli* to which children can relate, we are convinced that the likelihood of inferred learning that unwed parenthood is necessarily good or praiseworthy, is highly improbable, if not speculative." (Emphasis supplied.)

This finding was fully confirmed by the Circuit Court, which added the following comment:

> "The record before us contains no evidence of proselytizing of pupils by the plaintiffs and reveals instead that each plaintiff, along with her illegitimate offspring, is living under the same roof as her parents, brothers and sisters. It would be a wise child indeed who could infer knowledge of either plaintiff's unwed parent status based on the manner of plaintiffs' existence." (Cert. Pet. App. 13).

Petitioners' answer to the foregoing is that they should not be put to the burden of sustaining their contention by any "facts", citing in support *Paris Adult Theatre* v. *Slaton*, 413 U.S. 49 (1973).

Passing for a moment the unusual effort to align the instant case with one dealing with obscenity, it is plain that petitioners have missed the thrust of the decision by this Court. Of course the Court recognizes that in the field of obscenity certain judgments of the State as to the impact of obscenity cannot be established by "conclusive evidence or empirical data" and that the legislature may rely on "the sum of experience," 413 U.S. at 63.

But the deficiency in this case went far beyond that of a lack of scientific studies. The deficiency in this case went to simple, objective, and plainly provable facts, namely, whether the fact of unwed parenthood was communicated to students and whether unwed parents proselytized. It was not the issue of the proof by scientific evidence of the impact of such knowledge or proselytization, but whether there was such. The comparable issue in an obscenity case would be proof as to whether the film was in fact shown, as distinguished from its impact.

It was on this score that the lower courts found the proofs lacking. Despite the fact that four of the five people affected by the rule had a record of prior teaching at the school, petitioners tried to substitute for factual proof of knowledge, understanding, communication, and proselytization, the speculation of Dr. van den Haag (*supra*, p. 13), whose specialty was psychoanalysis and who concededly had no familiarity with the community.

The deficiency in the record is heightened by the fact that petitioners called to the witness stand persons who would have known the facts on this score if they existed

(Mr. Pettey, Ms. McCorkle, Ms. Stancil) and the plaintiffs and at least one of the other affected teachers were on the stand and subject to cross-examination. *No proofs on this point were developed out of any of these witnesses.* The lower courts quite properly concluded that the petitioners should not substitute speculative opinions of experts for provable facts.

Beyond the question of whether there can be role-modeling of parental status without communication, the same irrationality exists under this rubric as under the rubrics of "character" and "morality". Mr. Pettey's rule permitted no repentance, and takes no account of a person's religious affiliation or standing in the community, which even Dr. Buchanan thought to be significant aspects of the "model" somehow projected by the teacher (*supra*, p. 12). Moreover, if married parenthood is the desired role, why does the rule not likewise bar the divorced, separated, or long-widowed parent? How, finally, can that be its purpose if those who marry, and thereby conform their behavior to the desired role, be barred? As with "morality", the defined "model" lacks the most elemental rational relationship to this asserted purpose. See, *Eisenstadt* v. *Baird*, *supra*.

C. *High school pregnancies*

We know no better answer to the assertion of a connection between unwed parenthood of teachers and high school pregnancies than Dr. Kenneth B. Clark's comment:

> "I am sorry, I just can't take that seriously. I think that young girls become pregnant through sexual behavior. They don't become pregnant in a classroom.
>
> "I'm not being facetious. I really think that that is an absurd statement and absurd question." (Dep. 25.)

Indeed, the assertion is so patently absurd that even Mr. Pettey did not make it; he was concerned with providing a "moral climate" (Tr. 3/16, Pettey, 9), and models of achievement to which children could aspire (*id.* at 25), and admitted that he promulgated the rule without any basis in his own experience, in science, or in sociology, causing him to believe any such connection exists (*id.* at 10, 23, 24). Dr. Buchanan never addressed this question, and Dr. van den Haag premised this effect on a tortured construct.[22]

It is no wonder that the Circuit Court likewise rejected as "without support, other than speculation and assertions of opinion" this final rationale "proffered by the school district in hopes of salvaging the Pettey rule" (Cert. Pet. App. 13).[23]

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[22] Dr. van den Haag's testimony, so heavily relied on by petitioners (Pb 7), was that teachers would inevitably communicate their unwed status, and that "even if the teacher feels it [having children out of wedlock] is wrong . . . it would be hard for the teacher to present himself as a repentant sinner, . . . [s]o in effect the teacher would be compelled . . . to tell the children that it is all right to have children out of wedlock" (Dep. 17).

[23] With one exception, every case respondents have found dealing with the issue of exclusions, from employment or schools of unwed pregnant girls or mothers, has invalidated the exclusion either as irrational, see *Perry* v. *Grenada Municipal Separate School District*, 300 F. Supp. 748 (N.D. Miss 1969) and *Shull* v. *Columbus Municipal Separate School District*, 338 F. Supp. 1376. (N.D. Miss. 1972) (unwed pregnant schoolgirls); or as both irrational and an inherently sex-based discrimination, see *Cirino* v. *Walsh*, 321 N.Y.S. 2d 493 (Sup. Ct. Spec. Term, N.Y.Co. 1971) (Puerto Rican mother of eight children denied position as school crossing guard; court also held the exclusion to be racially discriminatory); *Doe* v. *Osteopathic Hospital of Witchita, Inc.*, 333 F. Supp. 1357 (D.Kan. 1971) (unwed pregnant office worker exclusion invalidated under Title VII). And see *Matter of Patricia A.*, 31 N.Y. 2d 83, 88-89, 335 N.Y.S. 2d 33, 37-38 (1972) discussed *infra* p. 63). The exception is *Wardlaw* v. *Austin Independent School District*, appeal pending No. 75-2275 (5th Cir.) (unwed pregnant teacher).

Moreover, it is well known that the status of unwed parenthood is not something which is affirmatively sought but rather imposed by force of circumstance.[24] Primary among the causes of out-of-wedlock birth to teenage girls is the lack of information and realistic understanding about the risks of pregnancy,[25] and the lack of access to effective contraception, which falls heaviest on the poor.[26] Moreover, abortional services are virtually unknown in Mississippi.[27]

Two recent Mississippi statutes indicate that the promotion of increased access of minors to birth control information is an important concern of the State. See, § 41-42-5, *et seq.*, "Mississippi Family Planning Law of 1972" (Miss. Code Ann. 1973). In particular it should be noted that § 41-42-7 gives specific authority to the Drew Public School District to refer students to a physician for the furnishing of contraceptive supplies and information. Clearly a school district seriously interested in reducing out-of-wedlock births could have an effect by exercising this authority rather than by creating spurious teacher exclusions which do not make an iota of difference.

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[24] Cutright, "Illegitimacy: Myths and Causes," 3 Family Planning Perspectives, No. 1, 25, 26 (Jan. 1971). For example, 90% of A.F.D.C. mothers in Cook County defined their children's births as unwanted. Greenleigh & Assoc., Facts, Fallacies & Future: A study of the AFDC Program, Cook Co., Illinois (mimeo N.Y. 1960).

[25] Cutright, *supra*, at 41; Fischman, et al., "Factors Associated with the Decision to Deliver or Abort" (unpub. manu., Family Planning Perspectives Library, 1974).

[26] O.E.O., *Need for Subsidized Family Planning Services: U.S., Each State and County*, pp. 4, 5, 8 (GPO 1969); Cutright, *supra*, at 41-44.

[27] Brody, "National Study Finds Many Unable to Get Abortions in 1974 Despite Supreme Court Easing of Curbs," *New York Times*, 10/7/75, p. 15, col. 1.

Indeed, the complete absence of any basis to connect the supposed objective of reducing illegitimacy with the presence of unwed teachers suggests that the sole objective of the rule was punishment and stigmatization. Petitioners implicitly admit this in their brief, characterizing Pettey as believing "that the influences created by application of this rule would arrest this trend" (Pb 4). This impact was not lost on the lower courts, which recognized that "where no stigma may have existed before . . . inquisitions by overzealous officialdom can rapidly create it" (Cert. Pet. App. 11, 30).

Punishment and stigmatization as a method for reducing illegitimacy has never been sustained by this Court, though it has been repeatedly urged as legitimate. See, *Levy* v. *Louisiana*, 391 U.S. 68, 71-72 (1968); *Glona* v. *American Guaranty & Liability Ins. Co.*, 391 U.S. 73, 75-76 (1968); *Weber* v. *Aetna Casuality & Surety Co.*, 406 U.S. 164, 175-76 (1972); *New Jersey Welfare Rights Organization* v. *Cahill*, 411 U.S. 619 (1973). (See *infra*, p. 75).

Essentially petitioners argue that they should be permitted to impose their rule without the most minimal proof of rationality but merely upon their own assertions that it is a method of dealing with the question of illegitimacy. The peroration of their brief argues that:

> "The demise of this policy will cause irreparable damage to this small rural school district and retard if not completely destroy its efforts to 'shape the attitude of young minds toward the society in which they live.'" (Pb 35)

The lower court judges are of course quite familiar with this area of the country and understandably were not moved by such hyperbole. This is precisely the context where the principle, recently reiterated by Mr.

Justice Rehnquist, dissenting in *Keyes* v. *School District No. 1*, 413 U.S. 189, 264, (1973) applies with full force:

> "Indeed, it would be contrary to settled principles for this Court to upset a factual finding sustained by the Court of Appeals. 'A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error.' *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211, 214 (1948)."

Yet reversal of the findings below is precisely what petitioners urge upon this Court!

II.

The Pettey rule impermissibly invades and punishes the constitutionally protected parent-child relationship deemed fundamental by this Court.

Mr. Pettey's rule, which permanently bars from most employment in the school district parents of out-of-wedlock children, falls by admission only upon those whose parentage is discoverable through limited investigation. By concealing the existence of one's biological child, by abandoning this child to adoption, foster care, or orphanages, a person escapes the devastating, life-long effect of the rule. It is only those unwed parents who have assumed responsibility for the nurturance, care, and upbringing of their natural children who are denied employment. Thus the rule both threatens and punishes the existence and continuation of this fundamental relationship.

Parent and child are equally victims of the rule whether it operates to induce abandonment or to impose

upon the family unit economic deprivation and stigma based solely on the child's illegitimate status. Moreover, applied to this public school system, Mr. Pettey's rule multiplies the effect on the family unit: it casts the stigma of inferiority upon the substantial proportion of school children who are themselves born out of wedlock.

A. *The Private Relationship Between Parent And Child Ranks As Fundamental In Our Constitutional Scheme Of Values.*

In a long line of decisions this Court has upheld against various forms of governmental intrusion the interest of parents in raising and nurturing their own children, deeming this right "essential," *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1943), and one of the "basic civil rights of [wo]man," *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942) and as "[r]ights far more precious . . . than property rights," *May* v. *Anderson*, 345 U.S. 528, 533 (1953). In *Prince* v. *Massachusetts*, the Court likewise declared that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder," and that "it is in recognition of this (fundamental role and interest of the parent) that these decisions have respected the private realm of family life which the state cannot enter." *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944). See also *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). Only where the exercise of parental control or management threatens the welfare of the child, *Prince* v. *Massachusetts*, *supra; Stanley* v. *Illinois*, 405 U.S. 645, 652 (1972), or transcends this private realm to pose a serious hazard to the general welfare, *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1905), or to impose its values beyond the home, *Baker* v. *Owen*, 395 F. Supp. 294 (M.D.N. Car.), — U.S. —, 96 S.Ct. 210 (1975), will the exercise of parental control be subject to limitation by the State.

In *Stanley* v. *Illinois*, this Court, drawing upon this historic and settled line of cases, addressed the "fragile and vulnerable" interest which is at stake here, the interest of the parent in the *existence* of the relationship itself. This is an interest even more fundamental than the manner or nature of the exercise of parental control. Like respondents herein, the unwed father in *Stanley* asserted the right to equal recognition and protection of the law for the sacredness of the parent-child relationship "unlegitimized by a marriage ceremony," 405 U.S. at 651. Encompassing this Court's teachings in *Levy* v. *Louisianna*, 391 U.S. 68, 71-72 (1968) and *Glona* v. *American Guarantee & Liability Insurance Co.*, 391 U.S. 73, 75-76 (1968), that "familial bonds in such cases were often as warm, enduring and important as those arising within a more formally organized family unit", and that the "test of equal protection should [not] be the legal' rather than the biological relationship", Mr. Justice White declared that:

> "[T]he private interest here, that of a man in the children he has sired and raised undeniably warrants deference and absent a powerful countervailing interest, protection," *supra*, at 405 U.S. at 651.

"The integrity of the (unlegitimized) family unit" he continued, finds its "protection in the Due Process Clause of the Fourteenth Amendment, *Meyer* v. *Nebraska* . . . the Equal Protection Clause of the Fourteenth Amendment, *Skinner* v. *Connecticut*, . . . (Goldberg, J., concurring)." *Stanley* v. *Illinois*, *ibid.* (citations omitted).

The rule here at issue, unlike that in *Stanley*, does not dictate temporary or final dissolution of the custodial relationship. But it is settled in the decisions of this Court that eligibility for public employment, in the

schools or othewise, may not be conditioned "on a basis that infringes . . . constitutionally protected interests . . . [because] exercise of those freedoms would in effect be penalized and inhibited . . . and [t]his would allow the government to 'produce a result which [it] could not command directly.' *Speiser* v. *Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 2 L. Ed. 2d 1460." *Perry* v. *Sinderman*, 408 U.S. 593, 597. "Such interference with Constitutional rights," the Court held unanimously "is impermissible." *Ibid.*

Surely the interest in the nurturance of one's natural child commands at least equal Constitutional protection as the First Amendment rights referred to in *Perry*. Indeed, "[o]f this whole 'private realm of family life' it is difficult to imagine what is more private and more intimate" than the relationship between parent and child. Compare, *Griswold* v. *Connecticut*, *supra* at 495 (White, J., concurring), citing *Poe* v. *Ullman*, 367 U.S. 497, 551-552 (1961) (Harlan, J. dissenting). In no other relationship is there a natural bond so deep and irrevocable, is the need and dependency greater or the influence more indelible; no other relationship can or should be so indissoluble.[28]

The Common Law has long recognized the primacy of the bond between biological parent and child, independent

[28] Compare the transitoriness of the marriage relationship. A Census Bureau report indicates that the percentage of marriages ending in early divorce is rising. U.S. Bureau of the Census, Current Population Reports, Series P-20, No. 239, "Marriage; Divorce and Remarriage By Year of Birth 1: June, 1971, (1972), and according to extrapolations, one-fourth of all married women reaching 50 years of age in the 1980's will have had their first marriages end in divorce. *Ibid.* Cited in Babcock, et. al., *Sex Discrimination and the Law: Causes and Remidies*, 677 (Little Brown, 1975).

of a marriage relationship, even against a "more suitable" custodian. As stated so movingly by the Mississippi court:

> "In all civilized countries, in which the family is regarded as the unit of social organization, its minor members must and ought to be subject to the custody and control of those who are immediately responsible for their being, for the reason that by nature there has been implanted in the human heart those seeds of parental and filial affection that will assure to the infant care and protection in the years of its helplessness. . . . The law at the birth of an infant imposes upon the parent the duty of such care and protection, to the performance of which the instincts of nature so readily prompt, and clothes him with the right of custody, that he may perform it effectually upon the harmony with nature, is best for the interest, not only of the parent and child, but also of society." *Hibbette* v. *Baines*, 78 Miss. 695, 704, 29 So. 80 at 81 (1900).

Mr. Pettey's rule accords not sanctity but scorn to this relationship. The ineluctable impact of Mr. Pettey's rule is both to infringe and to punish the fundamental right of nurturance recognized in *Stanley*. The rule puts intolerable pressure on the acknowledgement and maintenance of the relationship between parent and child. The pregnant teenager or young mother is on notice that the cost of caring for her natural child is the abandonment of her aspirations to enter the teaching profession or to work in the school system. The rule would exact an impermissible toll if but one child was denied knowledge of its parentage, separated from its biological parent, or cast out from its parental home to be raised by strangers, be it in a family or institutional context.[28a]

As with the rule in *Stanley*, Mr. Pettey's rule which "explicitly disdains present realities in deference to past formalities, . . . needlessly risks running roughshod over the important interests of both parents and child." *Ibid.* at 657.

B. *The Rule Barring Employment Of Parents Of "Illegitimate" Children Sets Up An Invidious Classfication Which Heaps Deprivation And Stigma Upon Parents And Children Alike.*

The onus of this rule falls upon the child as well as the mother. For the respondents herein, and other unwed mothers who have acknowledged and assumed responsibility for their children, "who have cared for them and nutured them," the rule imposes harsh punishment.

The caretaking parent is denied virtually all employment in the school system. She must therefore give up her professional aspirations and desire to work with children, or she must uproot herself and travel to a distant community.[29] More likely, she is consigned to unemployment or welfare, or relegated to marginal employment, often available only at a distance from her home and child.[30]

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[28] ". . . community disapproval and penal sanctions against the mother may intensify the mother's desire to protect her anonymity and rid herself of the infant. Although the incidence of infanticide and abandonment are not as great as they were in puritan days . . . the pressure on the modern unmarried mother may result either in (illegal) induced abortion or anonymous release of the child for adoption." Foote, Levy and Sanders, *Cases and Materials on Family Law* 118 (Little Brown & Co., 1966).

[29] Dr. Buchanan testified that he had fired unwed parent teachers in his tenure in other school systems (Tr. 5/31, at 54-56); that he would not recommend such a person to be hired (*Id.* at 63).

[30] The impact of this rule is not hypothetical but illustrated herein by the fate of respondents themselves (*supra*, pp. 4-5).

Not only is this rule contrary to federal policy as evidenced in Congressional enactment of the Work Incentive Program,[31] but it serves to perpetuate the cycle of poverty from which these women have struggled so arduously to escape.[32]

The impact of this rule is upon mother and child as a family unit. The denial of employment here is functionally indistinguishable from the ineligibility to sue for wrongful death, to share in disability benefits, social

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[31] The WIN program was initiated in 1970 to encourage parents receiving AFDC to seek outside employment. 42 U.S.C. § 602(a)(19). It's "Statement of Purpose" reads: "The purpose of this part is to require the establishment of a program utilizing all available manpower services, including those authorized under other provisions of law, under which individuals receiving aid to families with dependent children will be furnished incentives, opportunities, and necessary services in order for (1) the employment of such individuals in the regular economy, (2) the training of such individuals for work in the regular economy, and (3) the participation of such individuals in public service employment, thus restoring the families of such individuals to independence and useful roles in their communities. It is expected that the individuals participating in the program established under this part will acquire a sense of dignity, self-worth, and confidence which will flow from being recognized as a wage-earning member of society and that the example of a working adult in these families will have beneficial effects on the children in such families. 42 U.S.C. § 630.

[32] It has been frequently noted that the incidence of illegitimate births tends to fall most heavily on black and poor women. See, generally, Public Health Service, U.S. Dept. of Health, Education and Welfare, *Trends in Illegitimacy in the United States* 1940-1965 (1968). Indeed the causes of unwed parenthood are most often traceable to the low income of the parents. See also *Studies in Public Welfare, Lerman*, "The Family, Poverty and Welfare Programs: Factors Influencing Family Instability," p. 12, prepared for the use of the Joint Economic Committee of the Congress of the United States (GPO 1973) (hereinafter "Lerman").

security benefits and welfare assistance to families of working poor (AFWP) based on the illegitimacy of the child,[33] all of which were struck down by this Court respectively in *Levy* v. *Louisiana, supra, Glona* v. *American Guarantee and Liability Insurance Co., supra; Weber* v. *Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972); *Davis* v. *Richardson*, 342 F. Supp. 558 (D. Conn.), aff'd 409 U.S. 1069 (1972); *Griffin* v. *Richardson*, 346 F. Supp. 1226 (D. Md.), aff'd 409 U.S. 1069 (1972); *New Jersey Welfare Rights Organization* v. *Cahill*, 411 U.S. 619 (1973); *Jiminez* v. *Weinberger*, — U.S. —, 94 S. Ct. 2496 (1974). Like these "invidious" exclusions, the employment bar at issue visits the condemnation of the nonmarital sexual union ultimately on the child. As Justice Powell stated the principle in *Weber* v. *Aetna Casualty and Surety Co.*:

> But visiting this condemnation on the head of the infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as unjust—way of deterring the parent. *Supra* at 175.

The Court has thus clearly recognized that child and parent are inextricably intertwined in the web of deprivations based on illegitimacy. Even where, as here, the deprivation falls upon the "household" and not the child alone, the Court has refused its sanction. *New Jersey Welfare Rights Organization* v. *Cahill, supra*, as em-

[33] Though articulated as a rule barring unwed parents, it is based entirely on the illegitimacy of the child, since subsequent marriage of the mother does not cure the disability.

phasized at 621-623 (Rehnquist, J., dissenting). Finally, by contrast to every other deprivation invalidated by this Court, the disqualification imposed here is absolutely and universally uncorrectable by the parent, even if, like Ms. Peacock, she subsequently marries. See *Weber* v. *Aetna Casualty and Surety, supra* at 176 (Blackmun, J., concurring); and compare *Stanley* v. *Illinois, supra* at 660 n. 1 (Burger, J., dissenting); *New Jersey Welfare Rights Organization* v. *Cahill, supra;* and cf. *Labine* v. *Vincent*, 401 U.S. 532, at 539 (1971).

The deprivation wreaked upon parent and child by the Pettey rule does not stop with the denial of employment itself. The rule constitutes official legal sanction of the devastating stigma that has been historically attached to the status of illegitimacy.[34] For this Court to sustain the rule would undermine the cardinal principle announced in *Weber* that the law may not lend its authority to such invidious classification. Justice Powell continued:

> "Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to the status of birth where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise." *Supra*, at 175-176.

The deprivation and stigma sanctioned by Mr. Pettey's rule do not stop with mother and child. Children born out of wedlock tend to identify with the "blotch" upon their mother and are deeply affected by knowledge of their illegitimacy.[35] In the educational context the stigma cast upon the out-of-wedlock child appears significantly to

[34] Fodor, "Emotional Trauma Resulting From Illegitimate Birth," 54 Archives of Neur. & Psych. 381 (1945).

[35] Davis, "Illegitimacy and the Social Structure," 45 Am.J.Soc. 215, 228, 231-233 (1939).

lower achievement levels.[36] By branding unwed mothers as immoral and unfit to teach or be in proximately to the students, the School District is thus announcing to approximately one-third of the school population (*supra*, pp. 8-10) that their birth and family backgrounds are shameful thereby brandin gthem as inferior to their "legitimate" classmates.

III.

The Pettey rule is, by design and application a sex-based classification which perpetuates the historic condemnation of the unwed mother.

It is the product, not of fortuity, but of design that the five victims of Mr. Pettey's rule are women.

Despite his attempt to maintain semantic neutrality for the rule, Mr. Pettey admitted at the hearing that he had instructed Ms. McCorkle not to hire "unwed mothers" (*supra*, p. 7). Since the policy is an unwritten one, Mr. Pettey's instructions to Ms. McCorkle, who implemented the rule, should be understood by the Court to define the rule, and they demonstrate its facially sex-based character.

Mr. Pettey's admission was not simply an unfortunate "slip of the tongue;" rather, it reflects its sex-discriminatory design and object. Mr. Pettey was well aware of the difficulty of applying his rule to men. He readily agreed that it is "easier to find an unwed mother than an unwed father [b]ecause the unwed mother is stuck with the result" (Tr. 3/16, Pettey, 24). Yet he

[36] Jenkins, "An Experimental Study of the Relationship of Legitimate and Illegitimate Birth Status to School and Personal and Social Adjustment of Negro Children," Am. J. Soc. 169 (1969).

implemented his policy in a way which he knew would not touch the unwed father, for despite the greater difficulty of finding unwed fathers, he never advised Ms. McCorkle that she should specially inquire of male applicants whether they have sired illegitimate children, or take any additional steps to ascertain their paternity. (*Ibid.*).

Thus, as understood by the rule's creator, the carefully picked term "unwed parent" is synonymous with "unwed mother." Petitioners' semantic neutrality is but a cover for perpetuating historic discrimination which visits upon the woman alone "society's condemnation" of the non-marital sexual union because she is "stuck with the result." Women are doubly discriminated against by the rule: It is only *their* sexual activity which is punished; and only *their* parentage. It is only they who carry the "scarlet" badge. *Perry* v. *Grenada Municipal School District*, 300 F. Supp. 748, 753 (N.D. Miss., 1969).

Men and women are similarly situated with respect to the act of sexual intercourse that eventuates in the birth of an out-of-wedlock child. "[S]ave artificial insemination, a man . . . is equally the partner of the sexual act" (Cert. Pet. App. 36). Yet this man suffers no consequence for his sexual activity which is at the root of the "immoral" or "improper" status to which the rule is directed. The District Court perceived this sex-discriminatory aspect of the rule:

> "[T]he birth of a child is not an immoral or illicit event, but rather a biological and physiological fact. Thus, the true intent of the rule is, or logically should be, directed to the practice of premarital coitus, of which pregnancy and eventual childbirth is mere evidence. If such be the case, and morality is the true issue . . . the regulation, to be constitutional, must be equally burdensome

against male employees who may participate in such "immoral" acts." (*Id.* at 34; footnote omitted.)

The plain double standard embodied in the challenged policy is firmly rooted in historic attitudes toward unwed mothers:

> [T]he woman with an illegitimate baby . . . was guilty of succumbing to temptation and the man was not to be equally blamed . . . [I]t had been decided that erring women should suffer to the full consequences of a 'fall.'" Dewar, *Orphans of the Living: A Study in Bastardy*, 1968, pp. 20-21.

Likewise, this rule, directed to parentage of an out-of-wedlock child, to be neutral, should fall equally on men and women since "a male who sires an illegitimate child is equally . . . the parent of the child" (Cert. Pet. App. 36). Yet the father of the child escapes the rule's force. As the District Court held:

> "Although the rule professes to be neutral, proscribing employment of any parent, male or female, of an illegitimate child, the rule cannot operate that way. Unless the man either admits paternity or is so adjudged judicially, it is virtually impossible to prove his involvement. Nature does not readily, if ever, identify the offspring's sire." (*Id.* at 34.)

It is not nature alone, but the facility with which the father can conceal his status and abandon the child which excuses him. That most unwed fathers are strangers to their children was acknowledged not only by Mr. Pettey but also by this Court in *Stanley* v. *Illinois*, *supra*, 405 U.S. at 654, n. 6. The Chief Justice cogently characterized the situation in dissent:

> "In almost all cases, the unwed mother is readily identifiable, generally from hospital records, and alternatively by physicians or others attending the child's birth. Unwed fathers, as a class, are not traditionally quite so easy to identify and locate. Many of them either deny all responsibility or exhibit no interest in the child or its welfare; and, of course, many unwed fathers are simply not aware of their parenthood." 405 U.S. at 665.

Mr. Pettey's rule absolutely assured its discriminatory impact by the method he chose to enforce it. His reliance on Ms. McCorkle to use techniques of informal investigation confirmed that nothing would be done to reach behind the normal pattern of male abandonment and female nurturance. Any possibility of equal application of the rule was destroyed by its manner of implementation.

Thus, Mr. Pettey's rule, by design and application penalizes the unwed mother who assumes responsibility for the care and nurturance of the child and ignores the abandoning father, effectively rewarding his irresponsibility. Such a policy cannot masquerade as neutrality. If the policy were called what it is—an exclusion of unwed mothers—this Court could not ignore its sex-based nature. Surely the possibility that an unwed father might someday come forward and announce his disqualifying parentage does not cure its inherent defect.

In a series of recent decisions, this Court has begun to undo the ancient legacy of discrimination against women by declaring sex-based classifications to be "arbitrary," and "impermissible." *Reed* v. *Reed*, *supra*; *Frontiero* v. *Richardson*, 411 U.S. 677 (1973); *Stanton* v. *Stanton*, — U.S. —, 95 S.Ct. 1373 (1975); *Weinberger* v. *Wiesenfeld*, — U.S. —, 95 S.Ct. 1225 (1975); *Taylor* v. *Louisiana*, — U.S. —, 95 S.Ct. 692 (1975).

In each case, some traditional sex-role stereotyped assumption was argued in support of the legislative distinction and was rejected by this Court. Thus the Court has refused to sustain laws which prefer fathers over mothers as administrators of their child's estate, *Reed* v. *Reed, supra,* or which exclude fathers from "widows" benefits under the Social Security program, *Weinberger* v. *Wiesenfeld, supra;* see also, *Phillips* v. *Martin Marietta,* 400 U.S. 542 (1971); or which place different burdens for proving eligibility for spousal benefits on working men and women, *Frontiero* v. *Richardson, supra.* The fault in each of these statutes was that the members of one sex were automatically considered eligible for the rights there asserted without allowing any, or imposing a duty of equal investigation into the eligibility of the counterpart of the opposite sex. Mr. Pettey's rule presents the converse: Women who were once unwed mothers are automatically disqualified without investigation into whether a male applicant or employee shares the same disqualifying feature.

The teaching of these cases cannot be ignored when viewing a rule which falls exclusively on women and heaps upon their already disfavored status, condemnation and deprivation which is premised on a long history of legally reinforced social and cultural discrimination. *Gaston County* v. *United States,* 395 U.S. 285 (1965). This is the first case wherein this Court is squarely presented with the inherently discriminatory impact on women of an illegitimacy classification. Born of the sexual double standard, it is the woman who is condemned. (See Dep. of Dr. Kenneth B. Clark, *supra,* pp. 20-21). By contrast, the law has traditionally shielded the father from financial and social responsibility for his "transgressions" unless he voluntarily assumes it or unless it can be involuntarily imposed in paternity proceedings. See Krause, *Illegitimacy: Law and Social Policy* (Bobbs-Merrill Co., 1971); *Labine* v. *Vincent,* 401 U.S. 532 (1971).

Like the District Court below, the New York Court of Appeals has considered and rejected the double standard concerning responsibility for out-of-wedlock childbirth embodied in New York's age differential for girls and boys considered to be persons in need of supervision (PINS). The court said there is "no rational basis for exempting from the PINS definition, the 16 and 17 year old boy responsible for the girl's pregnancy, or out-of-wedlock birth," *Matter of Patricia A.,* 31 N.Y. 2d 83, 88-89, 335 N.Y.S. 2d 33, 37-38 (1972).

Petitioners in their brief completely ignore this issue and make no articulate reference to it although a few inferential comments should be noted. Petitioners' brief refers to an adult who "voluntarily or by fortune is placed in circumstances which may dictate his or her future" (Pb 11). The District Court, which made a decisive holding on the sex issue as an alternative ground for its decision, rejected this suggestion, referring to this Court's holding in *Frontiero* that a more burdensome treatment of a married woman in the armed forces could not be justified though her assumption of marital vows was no doubt voluntary (Cert. Pet. App. 35-36). Moreover, it is obvious that there is no difference in the voluntariness of sexual intercourse; voluntariness is only in nurturance. If voluntariness in nurturance is a basis for disparate treatment, then those who assume responsibility for their children are punished while those who neglect that responsibility are rewarded.

Similarly the sugestion that disparate treatment may be justified because of heightened "observability" of a status of unwed motherhood as against unwed fatherhood is but another way of building on historic patterns of discrimination against women and again provides a warped and inverted societal response as between those who assume responsibility and those who reject it.

Only in the past few years has the Court begun to undo the work of centuries. See, *e.g.*, *Gomez* v. *Perez*, 409 U.S. 535 (1973); *Stanley* v. *Illinois*, *supra*. But as Mr. Justice Blackmun recognized in *Stanton*, social patterns and sex-role expectations and disabilities, reinenforced by legal sanction, do not die easily and cannot be used to justify continued se-differentiated treatment. 95 S.Ct. at 1378. In this context, no argument of difficulty of equal application to members of both sexes who share the status disability can be heard in defense, because it operates as an engine for perpetuating the derogation of women only. Those arguments have been decisively rejected by this Court as justifications for sex-differential treatment. *Reed* v. *Reed*, *supra*; *Frontiero* v. *Richardson*, *supra*; *Weinberger* v. *Wiesenfeld*, *supra*; *Taylor* v. *Louisiana*, *supra*.

Mr. Pettey's rule, which not only embodies but perpetuates one of the cruelest aspects of the ancient and invidious legal as well as cultural discrimination against women, must be set aside because it punishes women for assuming the responsibility for the care and nurturance of their children, a responsibility which ranks among the interests recognized as fundamental by this Court.

IV.

Mr. Pettey's illegitimacy rule constitutes a race-based classification, built upon the legacy of slavery, and discriminates against Black women and their children.

The "illegitimacy" disqualification here at issue is but a thin veil for racial discrimination. As we have demonstrated above (pp. 8-9), a classification based on illegitimacy in Sunflower County falls exclusively on its Back population. It is not accident that the five victims of Mr.

Pettey's rule are all Black women. That is its necessary and ineluctable effect. The racial fault of the rule lies not in a mere statistical demonstration of its impact but in its design and history, since the rule is superimposed upon the residual consequence of a legal system imposed upon the Black population whose impact has not yet been overcome.

Applying the national Black-white adoption rates to statistics on out-of-wedlock births in Sunflower County as a whole, there will be 144 Black identifiably illegitimate children for every one white child similarly situated. While the differential ratio of Black and white unwed parents may be slightly less, the exclusive impact of the rule on Black unwed parents is a necessary consequence of the population upon which it operates.

Moreover, in view of the overwhelming correlation of race and illegitimacy among the school children stigmatized by the rule, the School District perpetuates the precise evil repudiated by this Court in *Brown* v. *Board of Education*, *supra*, namely, the branding of these Black students with a badge of inferiority. Since the population of the Drew School District is 80% Black and over 40% of those children are born out of wedlock, the stigmatization of Black children by this regulation is massive.

Where racial discrimination is concerned, the Court has made clear that it will not tolerate rules which, though seemingly neutral on their face, have the inevitable and overwhelming effect of excluding or affecting only Blacks. *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); where the disparity is overwhelming, a claimed lack of racially discriminatory intent and facial neutrality carry little weight.

The practical cornerstone of this principle is that, where the disparity is overwhelming, consequence, and

not intent, are the test of discrimination, *cf., Palmer* v. *Thompson*, 403 U.S. 217 (1971), and the inherently race-discriminatory nature of a rule and practice is proven through a factual demonstration of impact rather than through a probe of the minds of its creators. *Gomillion* v. *Lightfoot, supra; Gaston County* v. *United States*, 395 U.S. 285 (1969); *Turner* v. *Fouche*, 396 U.S. 346 (1970); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

Where, as here, a rule falls inevitably and exclusively on members of the Black race, this Court has not hesitated to acknowledge its true character. Thus, in *Gomillion*, the Court did not defer to the municipality's seemingly neutral exercise of its virtually absolute power to gerrymander in the face of proof that the only people drawn out of Tuskegee were the Blacks. In light of these facts, the Court held that "*the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration*," that the legislation was designed to exclude Blacks. *Gomillion* v. *Lightfoot, supra*, 364 U.S. at 341 (emphasis supplied). Mr. Justice Frankfurther continued:

> "It is difficult to appreciate what stands in the way of adjudging a statute having this inevitable effect invalid in light of the principles by which this Court must judge, and uniformly has judged, that, howsoever speciously defined, obviously discriminate against colored citizens.' *The Fifth Amendment nullifies sophisticated as well as simple-minded discrimination.*' *Lane* v. *Wilson*, 307 U.S. 268, 275 (1939) . . ."
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> "While in form this is merely an act redefining metes and bounds, . . . the *inescapable human effect of this essay in geography is to despoil colored citizens and only colored citizens* of their theretofore

> enjoyed voting rights." *Supra* at 347 (emphasis supplied).

Racial discrimination is established by statistical demonstration in other contexts as well. In *Turner* v. *Fouche*, *supra*, the fact that 96% of persons eliminated as potential jurors by jury commissioners as "unintelligent" and "not upright," 396 U.S. at 358, established *prima facie* proof of racial discrimination.

Here, as in *Gomillion*, the rule which excludes only mothers who rear their out-of-wedlock children is in fact synonymous with non-application to the white population and exclusive application to the Black population.[37]

Echoing these Constitutional holdings in the Title VII context, Mr. Justice Burger made clear that a demonstration of even a less than total racially disparate impact of a facially neutral employment condition establishes its racial character:

> "'[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built in headwinds" for minority groups and are unrelated

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[37] The overwhelming racial impact of this rule distinguishes this case from *Jefferson* v. *Hackney*, 406 U.S. 535, reh. denied, 409 U.S. 898 (1972), where the racial disparity was far less substantial. Even should this Court treat the illegitimacy exclusion here as establishing a less than overwhelming racial disparity, however, the Pettey rule, operating as it does in the employment context (see note 38, infra, p. 68), is not owed the deference this Court has traditionally accorded legislation involving distribution of social welfare benefits, as in *Jefferson*. Similarly, *James* v. *Valtiera*, 402 U.S. 137 (1971), in no way affects the force of *Gomillion* for in *James* the claimed racial impact was not established and the thrust of the disparity was in economic differentials which crossed racial lines.

to measuring job capability.' *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971)".[38]

Moreover, the Court has also treated as if facially impermissible, neutral rules or devices which, because they are built upon the effects of past discrimination, must logically result in disproportionate racial exclusion. The historic maintenance of a dual school system, *Brown* v. *Board of Education, supra*, precluded the validation of a school system now seemingly neutral but emerging from the "root and branch of discrimination." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 28 (1971); *Keyes* v. *School District No. 1*, 413 U.S. 189, 200 (1973). And the collateral consequences of past discrimination equally prevent approval of seemingly neutral tests which in fact perpetuate it in other forms. *Gaston County* v. *United States, supra*, 395 U.S. at 291, 293, holding that Blacks who had received inferior education under a racially segregated educational system would be necessarily discriminatorily affected by the use of a literacy test. See also, *Lane* v. *Wilson*, 307 U.S. 268, 275 (1939); *Griggs* v. *Duke Power Co., supra*, 401 U.S. at 429.[39]

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[38] Because of the overwhelming impact on Blacks here and the combination of employment and fundamental rights, respondents deem it unnecessary to enter the controversy concerning whether the strict Title VII standards should be applied to neutral employment conditions in the Fourteenth Amendment context. Compare, *e.g.*, *Davis* v. *Washington*, 512 F.2d 956 (D.D.C. 1975), *cert. granted*, — U.S. — 44 U.S.L.W. 3179 (No. 74-1492, Oct. 7, 1975), with *Tyler* v. *Vickery*, 517 F.2d 1089, 1098 (5th Cir., 1975). It is clear that a heightened standard of review is nonetheless applied, *Chance* v. *Board of Examiners*, 458 F.2d 1167 (2d Cir., 1972); *Armstead* v. *Starkville Municipal Separate School*, 461 F.2d 276 (5th Cir., 1972), relied on in *Tyler* v. *Vickery, supra*, at 1101.

[39] The historic pattern of voter discrimination against minorities similarly underlies the Congressional requirement that voter lists be automatically supplemented for jury selection purposes where they fail to yield a representative sample. 28 U.S.C. § 1863(b)(2). See Brief of Solicitor General, *Test* v. *United States*, — U.S. —, 94 S. Ct. 749 (1975).

The classification based on illegitimacy falls upon Black people as part of the legacy not only of discrimination but of the legalization of slavery itself. It was the deliberate conscious policy of the slaveholder to disrupt and prevent marriage and cohesiveness among Blacks since that would have interfered with the breeding of strong workers for sale,[40] and while more than a century has passed since the formal termination of the legal status of slavery, other governmental programs have perpetuated this centrifugal pressure on poor, largely Black families. "In the case of A.F.D.C., the family splitting incentive is well known. Poor families are not generally eligible for A.F.D.C. benefits unless one natural parent is absent . . . [which] encourages parents not to marry, to separate, and to avoid remarriage".[41]

In Sunflower County the maintenance of a stigmatized, deprived, and isolated Black population has continued until very recent history. After all, it was only in 1969—15 years after *Brown*—that the schools of Drew were desegregated and then only by court order (District Court opinion, Cert. Pet. App. 23).[42] And in 1966 an

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[40] Franklin, *From Slavery to Freedom*, 201-204 (Knopf 2d ed 1960), Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy*, 930, 931 (Harper and Bros., 1944). "Marriage", therefore, was often temporary and a matter of declaration, and could not constitute the exclusive context for sexual relations and childbearing. *Id.* at 935. The less formalized Black family structure that emerged as a response to slavery was viewed by Myrdal as a healthy social adjustment to extreme adversity. *Ibid.*

[41] Lerman, *supra* n. 28. *Cf.*, *King* v. *Smith*, 392 U.S. 309 (1968); *Lewis* v. *Martin*, 397 U.S. 552 (1970).

[42] Just prior to his tenure at Drew, Mr. Pettey himself was adjudged liable for perpetuating racial segregation in the Tunica County school system by paying from school funds salaries to white teachers refusing reassignment to integrated schools in accordance with a prior court order and by allowing use of public school property in private schools after the desegregation order. *United States* v. *Tunica County School District*, 323 F. Supp. 1019 (N.D. Miss., 1970).

election of municipal officials in that County had to be set aside because of exclusion of Blacks from the voting prcess. *Hamer* v. *Campbell*, 358 F.2d 215 (5th Cir., 1966), *cert. den.*, 385 U.S. 851 (1966).

Mr. Pettey's rule cannot be separated from its roots in the most vicious legal discrimination imaginable. It punishes in the name of morality illegitimacy and matriarchy which are fundamentally postive survival mechanisms: ". . . The mother-centered family with its emphasis on the primacy of the mother-child relation and only tenuous ties to a man, then, is the legacy of adaptations . . . worked out during slavery". Rainwater, "Crucible of Identity" in *Daedalus*, 172, 179 (Winter 1960). As with the literacy test in *Gaston*, the race-discriminatory character of Mr. Pettey's rule is not only logically inferrable from the history of discrimination, *supra* 395 U.S. at 295; it is inherently impermissible in that, even if " '[i]mpartial administration' " were possible, the rule "would serve only to perpetuate these inequities in a different form." *Id.* at 297.

To permit this illegitimacy classification to stand would invite its adoption in a broad range of public and private employment contexts as a convenient pretext for racial discrimination and for stigmatization of the Black community.

The singular impact of this rule on Black people, in the context of an "educational system," cannot be read as anything other than "an official expression of inferiority towards black citizens," *Palmer* v. *Thompson*, *supra*, 403 U.S. at 229 (Blackmun, *J.*, concurring).

In a remarkable *tour de force*, petitioners seek to turn the facts in this case on their head. They argue that in invalidating this regulation the lower courts have supported the protection of separate "moral values" of the

Black community; that respondents are at odds with *Brown* v. *Board of Education* and that in essence respondents are saying, "You must recognize two cultures in your community and accommodate them both." With much nautical language, petitioners argue that we "set sail" upon a collision course with prior decisions of this Court (Pb 34).

Respondents, quite to the contrary, seek the fullest implementation of *Brown* v. *Board of Education*. They seek to strike down Mr. Pettey's rule for many reasons, including that it gives the "sanction of the law" to the deprecation of the Black community; it 'generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone" and affects "the motivation of a child to learn," *Brown*, 347 U.S. at 494. See, *Jenkins*, *supra*, n. 36. As the District Court, sensitive to the local history and conditions, so cogently observed:

> "Where no stigma may have existed before, such inquisitions by overzealous officialdom can rapidly create it." (Cert. Pet. App. 30.)

This is, of course, not the first time that a litigant before this Court, having engaged in racial discrimination, presents itself as the champion of equality and "color-blindness," *Green* v. *School Board of New Kent County*, 391 U.S. 430 (1968).

V.

The preclusion of employment under the Pettey rule punishes refusal or inability to use contraception or to have an abortion thereby intruding into a realm of privacy and liberty insulated from Government regulation.

This Court's recognition of the fundamental right of the individual married or single to control childbearing through contraception or election of abortion, *Roe* v. *Wade, supra; Eisenstadt* v. *Baird*, 405 U.S. 438; *Griswold* v. *Connecticut, supra*, does not sanction governmentally imposed coercion to employ these methods to prevent childbirth. Rather, the freedom protected by the Constitution is the right "to be free from unwanted governmental intrusion into matters so fundamentally affecting a person as the decision *whether* to bear or beget a child." *Cleveland Board of Education* v. *LaFleur, supra* 414 U.S. at 639, citing *Eisenstadt* v. *Baird, supra* 405 U.S. at 453.

Justice Goldberg made this principle clear in his concurring opinion in *Griswold*:

> While it may shock some of my Brethren that the Court today holds that the Constitution protects the right of marital privacy, in my view it is far more shocking to believe that the personal liberty guaranteed by the Constitution does not include protection against such totalitarian limitation of family size, which is a complete variance with our constitutional concepts. Yet, if upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married persons is valid, then, by the same reasoning, a law requiring compulsory birth control would seem to be valid. 381 U.S. at 497.

The rule here at issue has precisely this forbidden impact. Employability in the school system is conditioned first upon the effective use of contraception, which is singularly unavailable to young poor women (see *supra* n. 26).

Studies of pregnant teenagers illustrate that pregnancy is frequently the result of inadequate information concerning conception and contraception (*supra* n. 25). The rule thus punishes the poor and misinformed, not the sexual conduct itself. As Ms. Peacock stated in her testimony:

> During the time I became pregnant, as you say, black people wasn't aware of the many things that the white person would use in order to keep from getting pregnant. So if I had had all this counseling like, you know, maybe a parent that knew more about this, as a white person did, then I would say no, I wouldn't become pregnant at that time and no other time." (Tr. 3/20 63).

Lacking adequate contraceptive advice, pregnancy is expectable and abortion is the next possible route to employability under Pettey's rule. But, as with contraception, abortion is far less accessible to and understood by the young and the poor. Indeed, as to the five women victimized by Pettey's rule, legal abortion was absolutely precluded at the time of the births. But even though a legal abortion is now hypothetically available (*supra*, text at n. 27), this Court did not, by recognizing a woman's fundamental right to choose abortion, invest local governments with the power to dictate or pressure that choice by conditioning employment upon a willingness and ability to avoid pregnancy by effective contraception or to terminate a pregnancy by abortion. Indeed, in *Cleveland Board of Education* v. *LaFleur, supra*, this Court refused to sustain a significant, but far less weighty, pressure on the right to procreate than effected here by the permanent bar to teaching employment.

Writing this Court's landmark decision in *Roe* v. *Wade, supra*, Justice Blackman recognized the deep controversy that surrounds the question of abortion. Abortion is viewed by some people in this society as a completely impermissible alternative to unwed parenthood. Ms. Peacock expressed her own conscientious objection:

> "God put us here on earth and if it came up to that I feel that we should have them, you know. If we try to get rid of it, as most people do, that's killing it. Well, you know where we would wind up then." (Tr. 3/30 39).

To condition employment on the decision to abort not only repudiates the freedom of personal choice that is the hallmark of reproductive liberty recognized by this Court; it also infringes the free exercise of religion explicitly protected by the First Amendment. *Sherbert* v. *Verner*, 374 U.S. 398 (1963).

Petitioner's argument (Pb. Pont I, pp. 12-15) that this rule, punishing the parent and offspring of a non-marital sexual union is justified as a measure to pressure and encourage marriage is founded on a total distortion of the teachings of this Court.

Without minimizing the state's interest in regulating the institution of marriage, see e.g. *Boddie* v. *Connecticut*, 401 U.S. 371 (1971); *Sosna* v. *Iowa*, — U.S. —, 95 S. Ct. 553 (1975), of which the outlawing of bigamy is a part, this Court has made clear that there are certain aspects of private consensual sexual relations, including the use of contraception, access to abortion and the right to custody of one's biological though out-of-wedlock children that are beyond the reach of the State. *Eisenstadt* v. *Baird, supra; Roe* v. *Wade, supra; Stanley* v. *Illinois, supra.* Petitioners completely ignore this Court's holding in *Eisenstadt* that the right of "decision whether to bear or abort a child" belongs to the "*individual*", married or

single. *Supra* at 453; they torture the subsequent decision in *Roe* v. *Wade, supra* into affording protection to "certain activities relating to marriage" notwithstanding that plaintiff Roe was herself a single woman, *supra* at 712; and they make no mention of this Court's teaching in *Stanley* v. *Illinois, supra*, that the "rights to conceive and raise one's children" recognized in *Meyer* v. *Nebraska, supra* and *Skinner* v. *Oklahoma, supra*, are not confined to a ceremonialized marriage relationship. Nor do they mention Justice Powell's words in *San Antonio Independent School District* v. *Rodriguez* that "[i]mplicit in the Court's opinion [in *Skinner*] is the recognition that the right of procreation is among the rights of *personal* privacy protected under the Constitution." 411 U.S. 1, 34, 42-43, n. 76. (emphasis supplied). All these cases make clear that none of these fundamentally private activities can be interferred with in an effort to punish or deter non-marital sexual or family unions.

Finally, they deliberately ignore the entire line of cases in this Court which has rejected repeated arguments that punishment of illegitimacy is a permissible means to promoting the institution of marriage. See *Levy* v. *Louisiana, supra; Glona* v. *American Casualty and Surety Co., supra; Weber* v. *Aetna, supra.* They ignore that, most recently, in *New Jersey Welfare Rights Organization* v. *Cahill, supra*, the Court passed over the contention that an incentive scheme which denied benefits to households consisting of two unmarried adults and a non-adopted child would promote a legitimate state interest in assuring stability because it encouraged the formalization of non-martial and parent-child relationships. Of this whole line of cses they cite only *Labine* v. *Vincent, supra*, which had to do not with the regulation of sexual conduct or procreation, but with the regulation of land titles and the descent of property.

VI.

The confluence of fundamental protected rights and interests here requires that the Pettey rule be tested by the strictest standard of review.

As we have discussed in Point I, *supra*, there is no need to test the Petty rule by any but the minimal standard of review applied in the Equal Protection context, so lacking is it in any rational connection to a legitimate state interest.

The unusual confluence of fundamental rights and interests here, detailed in Points II, III, and IV, and V mandates, however, that the Court test the rule by the most stringent standard of review.

In a consistent line of cases, this Court has recognized that governmental conditions on employment which threaten, infringe or punish the exercise of fundamental rights will be accorded the same careful scrutiny accorded direct infringements on those rights. *Perry* v. *Sinderman, supra; Pickering* v. *Board of Education, supra; Keyishian* v. *Board of Regents, supra; Sherbert* v. *Verner, supra.*

Regulations impinging upon such vital and "sensitive areas of liberty" will not be sustained except upon a showing of a legitimate compelling and overriding state interest, and that the means employed are necessary and closely tailored to achieve the stated purpose. *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1961); *San Antonio Independent School District* v. *Rodriguez, supra.*

The rights at stake here are unquestionably among the most basic human rights "implicit in the concept of ordered liberty" *Palko* v. *Connecticut*, 302 U.S. 319 (1937) and "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder*

v. *Massachusetts*, 291 U.S. 97 (1934). *Meyer* v. *Nebraska, supra; Sherbert* v. *Verner, supra; Skinner* v. *Oklahoma, supra; Griswold* v. *Connecticut, supra; Stanley* v. *Illinois, supra; Roe* v. *Wade, supra; San Antonio Independent School District* v. *Rodriguez, supra.*

Moreover, where the regulation, as here, invades the fundamental rights of historically discriminated against racial minorities and women, the heightened scrutiny normally accorded such discriminatory classification is more rigorous still. *Gomillion* v. *Lightfoot, supra; Gaston County* v. *United States, supra; Hunter* v. *Erickson*, 393 U.S. 385 (1969); *McLaughlin* v. *Florida*, 374 U.S. 184 (1965); *Loving* v. *Virginia*, 388 U.S. 1 (1969); *Reed* v. *Reed, supra; Frontiero* v. *Richardson, supra; Taylor* v. *Louisiana, supra.*

The litany of strict scrutiny in decisions invalidating illegitimacy classifications, characterized repeatedly as "invidious", "illogical and unjust", see *Weber* v. *Aetna Casualty and Insurance Co., supra*, merits concretization in this case given manifold violations of the Constitution accomplished by the Pettey rule.

A rule which could not, in the concurrent judgment of the lower courts, meet the minimal test of rationality can hardly survive the strict scrutiny which its deep incursions into constitutionally protected rights and liberties require.

VII

The lower courts properly invalidated the pettey rule *in toto* and did not, as petitioners' suggest, call for individualized hearings.

The foregoing discussion demonstrates the overwhelmingly irrational, invidious and impermissible nature of the Pettey rule.

Petitioners misread the lower court opinions, however, characterizing them as having "opted for the position that an individual who seeks employment with the defendant school district should be given a due process hearing" (Pb. 20). This ignores the actual rulings, which were that the fact of unwed parenthood status is simply not relevant to teacher qualification.

Though both lower courts held that immorality or unfitness could not be presumed from the fact of unwed parenthood, they went beyond invalidating the *process* by which the Pettey rule operates. They invalidated as a matter of equal protection and due process, not the procedure but the very *permissibility* of this criterion of eligibility.

Cataloguing its evils, the lower courts found the rule to be not only absurdly and dogmatically overinclusive, but also to be invidiously underinclusive, ignoring pre— and extra-marital sexual activity; and they noted as well its incentive to abortion or child-abandonment; they also made decisive holdings as to the lack of any rational nexus to teacher qualification, role, or function. On these bases, they invalidated the criterion completely.

The "Judgment" of the District Court, affirmed *in toto* by the Circuit makes this unmistakeably clear.[43] In

[43] The "Ordered" portion of the judgment states as follows:

(1) The policy and practice in the Drew Municipal Separate School District against hiring unwed parents in the public schools is declared to be *null and void*, as violative of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution; and the defendants, their agents, and employees are *permanently enjoined from applying said policy directly or indirectly in the employment or discharge of school employees.*

[Footnote continued on following page]

particular, the *Judgment prohibits as to each respondent consideration of her "status as an unwed parent" as a factor of any relevance whatsoever to her eligibility* for a teaching position. Finally, far from inviting due process hearings, the District Court clearly recognized that petitioners might themselves seek to employ a hearing format to do by indirection what they were enjoined from doing directly. Thus the District Court erected around respon-

(2) The plaintiff, Ms. Lestine Rogers, be and she is hereby reinstated as teacher's aide in defendants' schools and adjudged entitled to recover monthly compensation of $250 for the 1972-73 school year, less any earnings she may have received in other employment since the date of her discharge. Said plaintiff, if she so desires, is entitled to be continued in the position of teacher's aide for the 1973-74 school year, except for good cause or *reasons unrelated to plaintiff's status as an unwed parent,* found to exist after according her a full and adequate due process hearing.

(3) The plaintiff, Ms. Katie Mae Andrews, who would have been hired as a teacher's aide except for the unconstitutional policy, is awarded damages at the rate of $450 per month for the months embraced within the second semester of the 1972-73 school year, less any earnings she may have received in other employment during said period of time. The said plaintiff, if she wishes, shall be employed by defendants for the school year 1973-74 except for good cause or *reasons unrelated to her status as an unwed parent,* found to exist after a full and adequate due process hearing.

(4) In the event due process hearings are held pursuant to either of the preceding paragraphs 2 and 3, defendants shall at their cost provide a complete a transcript of the evidence relating to the reason or reasons for not employing either or both of the named plaintiffs as teacher's aides for the forthcoming school year, with a statement of defendants' findings and decision thereon. The court shall, at the request of any party, review such record and findings and enter judgment approving, reversing or modifying the defendant's decision as may be proper.

The court retains continuing jurisdiction to issue such further and supplementary orders as may be necessary to effectuate this Judgment in accordance with the Memorandum Opinion filed herein. (Emphasis supplied).

dents 'declared right to employment irrespective of their unwed parent status, a series of procedural safeguards designed to prevent circumvention of the Court's injunction and jurisdiction (*supra*, n. 43).

We agree with the lower courts that the invidious irrationality of the rule renders procedural due process an inappropriate and inadequate remedy in this case.

It is not that the essential prerequisites to individualized rather than categorical or presumptive treatment under the Fourteenth Amendment are lacking here. Quite the contrary: The conclusiveness of the presumption is absurd and unsupported by petitioners' own record (*supra*, Point I); indeed they themselves concede that unwed parent status does not "separate the moral from the immoral in litmus paper fashion" (Pb. 4). Moreover the confluence of basic human and constitutional rights and interests affected by the rule is virtually unprecedented and calls for close scrutiny. See, e.g. *Carrington* v. *Rash*, 380 U.S. 89 (1965); *Bell* v. *Burson*, 402 U.S. 535 (1971); *Stanley* v. *Illinois*, *supra*; *Reed* v. *Reed*, *supra*; *Vlandis* v. *Kline*, 412 U.S. 441 (1973); *Cleveland Board of Education* v. *LaFleur*, *supra*; and *cf. Salfi* v. *Weinberger*, — U.S. —, 95 S.Ct. 2457, 2470 (1970); see also *Board of Regents* v. *Roth*, *supra*. Finally, there can be absolutely no issue here of administrative inconvenience as suggested by petitioners (Pb. 20).[44] *Cf. Salfi* v. *Weinberger*, *supra*.

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[44] It is hard to see how an individual determination could have that effect where the record is clear that the entire process of hiring and retention of teachers is an individualized one.

Petitioners' argument is thus far less cogent than the contentions of other school boards which failed to avoid the Constitutional command of due process even where it required *institution* of special procedures for individualized determination. *Baker* v. *Owen*, *supra*, 395 F. Supp. at 301-303; *Goss* v. *Lopez*, 419 U.S. 565 (1975); *Cleveland Board of Education* v. *LaFleur*, *supra*.

The question is thus not whether the requisite elements for invalidating a conclusive presumption have been established; it is rather whether a decision grounded on process would be, in this case, even minimally adequate to cure the manifold constitutional defects of the rule.

The District Court, particularly sensitive to the local conditions, framed its judgment out of its realistic and logical concern that procedural due process could become a device and forum for never-ending stigmatization of Black women and their children, and the Circuit affirmed.

The lower courts effectively recognized that procedural due process simply would not remedy the inherent defects of a rule so fundamentally invidious and irrational; it would not cure or address the rule's sex—and race—discriminatory character as only Black women would be singled out for inquisition and hearing; nor would the prospect of hearings and character investigations cure or address the rule's encouragement of abortion or abandonment of one's biological child or its punitive implications for mother and child.

In sum, the lower courts recognized that procedural due process, with its "investigations" and "inquisitions by overzealous officialdom." (Cert. Pet. App. 11, 30), would serve only to create and perpetuate the very stigma which is impermissibly and spuriously imposed by the rule itself. It is for these reasons that they concurred in holding the presumption embodied in the rule to be "not only patently absurd", but also "mischievous and prejudicial" (*id.* at 11, 30), and in disallowing any consideration of unwed parenthood status as a criterion for teaching. Comp. *Stanley* v. *Illinois*, *supra*.

For all these reasons, Respondents submit that the guarantee of procedural due process and individual determination, otherwise appropriate where conclusive presumptions needlessly invade important or fundamental rights, would not remedy the fundamental discrimination herein.

CONCLUSION

Whereas Respondents have demonstrated that the Pettey rule cannot survive the minimal test of rationality, we urge the Court to explicitly recognize, as the Circuit Court declined to do, the panoply of fundamental constitutional rights and interests violated by this rule, if others are not to suffer, by evasion or device, the deprivation and stigmatization already suffered by Respondents, their children and the Black community of Drew.

WHEREFORE, the decisions of the lower courts should be affirmed.

Respectfully submitted,

Dated:
January 5, 1976

CHARLES VICTOR MCTEER
JOHNNIE EARL WALLS, JR.
P.O. Box 634
819 Main Street
Greenville, Mississippi 38701

LEWIS MEYERS
North Mississippi Rural Legal Services
Oxford, Mississippi 38655

RHONDA COPELON
ELIZABETH M. SCHNEIDER
MORTON STAVIS
NANCY STEARNS
Center for Constitutional Rights
853 Broadway
New York, New York 10003
Counsel for Respondents *

* Counsel gratefully acknowledge the contributions made to this brief by Fanette Pollock, a student at New York University Law School, and Miriam Karp, John Zirinsky, and Martha Salper, students at Brooklyn Law School.

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No. 74-1318

DREW MUNICIPAL SEPARATE SCHOOL DISTRICT, et al.,
Petitioners,

—v.—

KATIE MAE ANDREWS, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENTS

CHARLES VICTOR MCTEER
JOHNNIE EARL WALLS, JR.
P.O. Box 634
819 Main Street
Greenville, Mississippi 38701

LEWIS MEYERS
North Mississippi Rural Legal Services
Oxford, Mississippi 38655

RHONDA COPELON
ELIZABETH M. SCHNEIDER
MORTON STAVIS
NANCY STEARNS
Center for Constitutional Rights
853 Broadway
New York, New York 10003
Counsel for Respondents

IN THE

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RESPONDENTS' SUPPLEMENTAL BRIEF PURSUANT TO RULE 42(5)

Point IV of our brief (p. 64) argues that Mr. Pettey's illegitimacy rule is a race-based classification which is built upon the legacy of slavery, and which discriminates against Black women and their children. We pointed out that the rule has its impact exclusively on Black women and that such impact was its necessary and ineluctable effect. We also demonstrated that the racial impact of the rule was not a matter of accident but rather of design.

Following the submission of our brief, some facts were called to the attention of counsel which we believe sharpen the foregoing presentation.

It will be recalled that on May 28, 1969, the Drew Municipal School District was ordered desegregated by a United States District Court Order (Respondents' Brief, p. 3), *Carter* v. *Drew Municipal Separate School Dis-*

trict, Civil Action No. GC 6731-3, N.D. Miss., and that Mr. Pettey promulgated his rule two years later.

On August 17, 1973, plaintiffs in the foregoing desegregation suit against the School District filed a Motion for Supplemental Relief and for Contempt Judgment challenging as racially discriminatory defendants' policies and practices relating to faculty discharges and recruitment. Following the filing of that motion and the inspection of documents, plaintiffs on May 13, 1974, filed a comprehensive set of Requests for Admission, in response to which defendants on June 19, 1974, filed Answers which included the following:

> The number of full-time teachers, by race, employed by the Drew Municipal Separate School District for each school year, 1968-69 through the present is as follows:

	White	*Black*	*Total*	*% Black*	*% White*
1968-69	35	71	106	67%	33%
1969-70	33	68	101	67%	33%
1970-71	28	53	81	65%	35%
1971-72	32	46	78	59%	41%
1972-73	37	37	74	50%	50%
1973-74	46	35	75	47%	53%

The District Court's order in *Carter* relating to faculty desegregation was not entered until March 18, 1970, and required total faculty desegregation beginning with the 1970-71 school year. From that point forward, as defendant's statistics demonstrate, the ranks of black faculty were decimated while white faculty increased. In the year Mr. Pettey promulgated the policy herein at issue (1971-72), the second year that the School District was subject to the faculty desegregation order defendants increased the number of white teachers in their employ by four, while reducing the number of black teachers

by seven. By 1973-74, white faculty had increased by 31% (from 35 to 46) and black faculty had decreased by 51% (from 71 to 35).

Furthermore, annual "Reports to the Court" required by its desegregation order to be filed by the Drew School District establish that with respect to *elementary school teachers* the reduction in the percentage of black teachers and the increase in the percentage of white teachers is even more dramatic:

> Elementary Teachers, by Race, Employed by the Drew Municipal Separate School District for Each School Year, 1968-69 Through the Present

School Year	*White*	*Black*	*Total*	*% Black*	*% White*
1968-69	16	47	63	74.6	25.4
1969-70	11	33	44	75	25
1970-71	8	14	22	63.6	36.4
1971-72	16	10	26	38.6	61.4
1972-73	17	10	27	37	63
1973-74	No Figures				
1974-75	15	8	23	34.8	65.2

These statistics (a part of the record in another case pending in the District Court which heard the instant case) present a *prima facie* case of racial discrimination rendering all of defendants' employment practices suspect, *Keyes* v. *District No. 1*, 413 U.S. 189, 209 (1973); *Chambers* v. *Hendersonville City Board of Education*, 364 F.2d 189, 192 (4th Cir., 1966); *McLaurin* v. *Columbia Municipal Separate School District*, 478 F.2d 348 (5th Cir. 1973), and strongly supporting respondents' contention that Mr. Pettey's rule, adopted during a period

of "whitening" of the faculty, was in fact a race-based classification, both in purpose and impact.

Respectfully submitted,

Dated: February 27, 1976

CHARLES VICTOR MCTEER
JOHNNIE EARL WALLS, JR.
P.O. Box 634
819 Main Street
Greenville, Mississippi 38701

LEWIS MEYERS
North Mississippi Rural Legal Services
Oxford, Mississippi 38655

RHONDA COPELON
ELIZABETH M. SCHNEIDER
MORTON STAVIS
NANCY STEARNS
Center for Constitutional Rights
853 Broadway
New York, New York 10003
Counsel for Respondents